RECORD.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15,518

TAX REVIEW

MAY SEED AND NURSERY COMPANY,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION TO REVIEW DECISION OF THE TAX COURT OF THE UNITED STATES

FILED FEBRUARY 17, 1956

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[fol. 1] Docket Entries

May Seed and Nursery Company, Petitioner,

Docket No. 50073 vs.

Commissioner of Internal Revenue, Respondent.

Appearances:

For Petitioner: Denver A. Busby, C.P.A., Robert J. Bannister, Esq.

For Respondent: Julian A. Breman, Esq.

1953

Aug. 12—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 13—Copy of petition served on General Counsel.

Aug. 12—Request for Circuit hearing in Chicago, Illinois filed by taxpayer. 9/2/53, Granted.

Sept. 30—Answer filed by General Counsel.

Oct. 6—Copy of answer served on taxpayer, Chicago, Illinois.

1954

Aug. 11—Hearing set November 29, 1954, Chicago, Illinois.

Nov. 29—Hearing had before Judge Raum, on the merits. Stipulation of facts filed at hearing. Petitioner's brief due 1/13/55. Respondent's brief due 2/14/55. Petitioner's reply brief due 3/7/55.

Dec. 23—Transcript of hearing 11/29/54 filed.

1955

Jan. 10—Brief filed by taxpayer. Copy served on respondent by petitioner. (See letter).

Feb. 14—Answer brief filed by General Counsel.

Mar. 15—Motion for leave to file the attached reply brief, brief lodged, filed by taxpayer. 3/21/55 Granted.

Mar. 23—Copy of motion and reply brief served on General Counsel.

Sept. 29—Findings of fact and opinion filed, Raum, Judge. Decision will be entered for the respondent. 9/29/55 Copy served.

Oct. 28—Decision entered, Judge Raum, Div. 11.

Nov. 30—Petition for review by United States Court of Appeals, Eighth Circuit, filed by petitioner.

Dec. 1—Proof of service filed.

Dec. 12—Appearance of Robert J. Bannister as counsel filed.

Dec. 12—Designation of contents of record with acknowledgment of service thereon filed by petitioner.

Dec. 23—Order extending time to February 28, 1956 for filing the record and docketing the appeal, entered.

1956

Jan. 5—Amendment to petition for review filed by petitioner.

Jan. 5—Proof of service of amendment to petition for review filed.

[fol. 2]

Jan. 13—Motion for leave to file joint motion to vacate decision entered October 28, 1955 and to enter a new decision in accordance with stipulation, joint motion to vacate decision lodged, filed by respondent.

Jan. 13—Stipulation as to deficiency lodged.

Jan. 16—Motion for leave to file joint motion to vacate decision entered October 28, 1955 and to enter a new decision in accordance with stipulation, granted, joint motion to vacate decision filed by respondent.

Jan. 16—Stipulation as to deficiency filed.

Jan. 16—Order amending decision entered, Raum, Judge, Div. 11.

[fol. 3] (Petition of May Seed and Nursery Company)

(Received and Filed August 12, 1953, The Tax Court of the United States.)

The Tax Court of the United States

May Seed and Nursery Company, Petitioner,

Docket No. 50073 vs.

Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency and overassessment as set forth by the Commissioner in his letter dated and mailed May 15, 1953, ADC-AP:St.P-Omaha:EPM, a copy of which is attached as Exhibit "A" and made a part of this petition.

1. The petitioner, an Iowa corporation with its principal office at Shenandoah, Iowa, filed its return for the fiscal year 1942 in the Collection district at Des Moines, Iowa.

2. The Commission determined a deficiency in income tax of $9,730.18 and an overassessment of Excess Profits tax of $31,387.69 for the fiscal year ended June 30, 1942. The amount of the overassessment of Excess Profits tax computed under the law is $38,569.48 and the resulting deficiency in income tax is $11,956.53. The net amount in controversy is $4,955.44.

3. The determination of tax liability set forth in the Commissioner's letter of May 15, 1953 was based upon the following error:

The failure and refusal to allow an unused excess-profit tax credit for the fiscal year 1941, computed under the provisions of Sec. 722 of the Internal Revenue Code, to be carried forward to the fiscal year 1942 as provided by law.

[fol. 4] 4. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is a corporation organized under the laws of the state of Iowa on January 1, 1919 and has

its principal office and place of business at Shenandoah, Iowa, where it engages in a farm seed and supply business.

(b) On September 15, 1943, petitioner filed applications for relief, form 991, under Section 722 of the Internal Revenue Code for the fiscal years 1942 and 1943.

(c) In its application for relief for 1943, petitioner attached a computation of an unused excess-profits tax credit, computed under Section 722, for the fiscal year 1941. (Exhibit "B" hereto.)

(d) In its application for relief, form 991, for the fiscal year 1942, a copy of which is attached as Exhibit "C"; the claimed constructive average base period net income exceeded the excess-profits net income for the year 1942 and no computation of an unused credit from 1941 was attached to the application.

(e) A timely application for relief under Section 722 was duly filed for the fiscal year ended June 30, 1941.

(f) From September 15, 1943 to December 1951, the Omaha division made numerous examinations of petitioner's books and records and many conferences were held but no constructive base period net income was allowed and no requests were made of petitioner to furnish a computation of an unused excess profits tax credit for the fiscal year 1941.

(g) On April 3, 1952, petitioner and the Excess Profits Tax Council in Washington, D. C. agreed upon a

[fol. 5] Constructive Average Base Period Net Income as follows:

Taxable Year Ended	Amount
June 30, 1941 (for carryover purposes)	$58,200.00
June 30, 1942	96,900.00
June 30, 1943	96,900.00
June 30, 1944	96,900.00
June 30, 1945	96,900.00
June 30, 1946	96,900.00

(h) The unused excess-profits credit for the fiscal year 1941 is $18,487.12.

(i) The Commissioner's Regulations, Rulings and Instructions in effect on September 15, 1943 did not require applicants under Section 722 to claim a carryover of an unused excess-profits tax credit.

(j) The Commissioner's Regulations were amended by T.D 5393, under date of July 21, 1944, to add the provision that applicants for relief under Section 722 should make a request for a carryover of an unused excess-profits tax credit.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that petitioner is entitled to the carryover of $18,487.12 as set forth in paragraph (4) (h) above and that it is entitled to a net refund of $26,612.95 instead of $21,657.51 as determined by the Respondent.

Denver A. Busby,
Counsel for Petitioner,
208 South LaSalle Street,
Chicago 3, Illinois.

[fol. 6] Verification by Petitioner

State of Illinois
County of Cook—ss.:

Raymond H. Sawyer, being duly sworn, says that he is the Vice President of the Petitioner above named, and as such officer is duly authorized to verify the foregoing petition, that he has read the petition and is familiar with the statements contained therein, and that the facts stated are true to the best of his knowledge and belief.

Original duly verified.

Subscribed and sworn to before me, this 11th day of August, 1953.

Notary Public in and for Cook County, Illinois.

[fol. 7] Exhibit "A"

ADC;Ap:ST.P
Omaha:EPM May 15, 1953

May Seed and Nursery Company
Shenandoah, Iowa

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended June 30, 1942, discloses a deficiency of $9,730.18, and that the determination of your excess profits tax liability for the taxable year ended June 30, 1942, discloses an overassessment of $31,-387.69 as shown in the statement attached.

In making this determination, your application for relief, Form 991, under Section 722 of the Internal Revenue Code, filed September 15, 1943, has been given careful consideration. It is noted that on April 3, 1952, you executed an agreement with respect to the allowance of a constructive average base period net income in the amount of $96,900.00 for the taxable year ended June 30, 1942, on the basis of your application for that year. Accordingly, the relief requested has been allowed in part.

In accordance with the requirements of Sections 272 and 732 of the Internal Revenue Code, notice is given of the deficiency mentioned and of the disallowance in part of the claim for refund asserted in your application for relief.

Within 90 days from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of your tax liability. In counting the 90 days you may not exclude any day unless the ninetieth day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the ninetieth day. Otherwise, Saturdays, Sundays, and legal holidays are to be counted in computing the ninety-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant

District Commissioner, Appellate, 324 Omaha National Bank Building, Omaha 2, Nebraska.

Very truly yours,
T. Coleman Andrews
Commissioner.
By: Ray H. Johnson
Acting Assistant Head, Appellate Division

Enclosures:

Statement, Form 1276, Agreement Form.

EPMcGrath:bmb

[fol. 8] Statement

May Seed and Nursery Company
Shenandoah, Iowa

Tax liability for the taxable year ended June 30, 1942.

	Liability	Assessed	Deficiency	Over-assessment
Income Tax	$36,513.07	$26,782.89	$9,730.18	
Excess Profits Tax	$12,690.38	$44,078.07		$31,387.69

In making this determination of your tax liability, careful consideration has been given to the reports of examination dated June 5, 1946, November 8, 1946, and October 8, 1948; to your protests dated August 18, 1945 and December 10, 1948; to the statements made at the conferences held November 4, 1946, May 5, 1950, October 12, 1950, April 1, 1952, April 2, 1952, April 3, 1952, and November 21, 1952; and to your claim for relief filed on September 15, 1943.

A copy of this letter and statement has been mailed to your representatives, Denver A. Busby and John S. Oden, 536 Des Moines Building, Des Moines, Iowa, in accordance with the authority contained in the power of attorney executed by you.

Schedule 1.

Adjustments to Declared Value Excess-Profits Tax Net Income.

Net income for declared value excess-profits tax computation as disclosed by return	$134,734.91
Unallowable income and additional deductions:	
(a) Net adjustments to income	2,329.54

Net income for declared value excess-profits tax computation as adjusted	$137,064.45

[fol. 9]

Schedule 1A

Explanation of Adjustment

(a) This adjustment reflects the results set forth in reports of examination previously furnished you. The additional liability arising therefrom has been assessed by virtue of a consent, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," executed by you under date of November 4, 1946.

Schedule 2.

Computation of Income Tax.

Net income for declared value excess-profits tax as adjusted, Schedule 1		$137,064.45
Less: Declared value excess-profits tax previously determined	$ 5,783.51	
Excess profits tax, Schedule 5	12,690.38	18,473.89
Net Income		$118,590.56
Normal Tax net income		$118,590.56
Normal Tax: 24% of $118,590.56		$ 28,461.73
Surtax net income		$118,590.56
Surtax:		
$25,000.00 at 6%	$ 1,500.00	
$93,590.56 at 7%	6,551.34	$ 8,051.34
Normal tax, supra		28,461.73
Total income tax		$ 36,513.07
Income tax liability		$ 36,513.07
Income tax assessed:		
Original Account No. 410015	$27,177.42	
Less Overassessment	394.53	26,782.89
Deficiency of income tax		$ 9,730.18

[fol. 10]

Schedule 3.

Adjustments to Excess Profits Net Income.

Excess profits net income computed under income credit method as disclosed by return	$129,324.90

Unallowable income and additional deductions:	
(a) Net adjustments to income	1,956.04
Excess profits net income computed under income credit method as adjusted	$131,280.94

Schedule 3A

Explanation of Adjustment

(a) This adjustment reflects the results set forth in reports of examination previously furnished you. The additional liability arising therefrom has been assessed by virtue of a consent, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," executed by you under date of November 4, 1946.

Schedule 4

Determination of Excess Profits Credit Based on Income

It has been determined that you are entitled to a constructive average base period net income for the taxable year of $96,900.00. This determination was made by the Excess Profits Tax Council and accepted in an agreement executed by you. Accordingly, your excess profits credit is 95% of $96,900.00, or $92,055.00.

The deduction of an unused excess profits credit carry-over, based on a constructive average base period net income determined by the Excess Profits Tax Council, from the taxable year ended June 30, 1941, to the year ended June 30, 1942, is not allowable for the reason that no claim for such credit carry-over was made on the application for relief filed for the year ended June 30, 1942.

Schedule 5.

Computation of Excess Profits Tax.

Excess profits net income computed under income credit method. Schedule 3		$131,280.94
Less: Specific exemption	$ 5,000.00	
Excess Profits Credit	92,055.00	97,055.00
Adjusted excess profits net income		$ 34,225.94
Excess Profits tax:		
$20,000.00 at 35%	$ 7,000.00	
$14,225.94 at 40%	5,690.38	
Total excess profits tax		$ 12,690.38

[fol. 11]

Excess Profits Tax Liability		$ 12,690.38
Excess profits tax assessed		
Original Account No. 400003	$40,849.36	
Additional Account No. 539021	3,228.71	44,078.07
Overassessment of excess profits tax		$ 31,387.69

[fol. 12] Exhibit "B".

May Seed And Nursery Company

Excess Profits Tax Computed After

Application Of Section 722

Fiscal Year Ended June 30, 1943

Carry-Over:		
Net Income for Fiscal Year Ended June 30, 1941		$ 92,996.78
Deduct—		
Declared Value Excess Profits Tax	$ 1,271.72	
Capital Gain on Sale of Stock	56,193.90	57,465.62
		$ 35,531.16
Net Income for Fiscal Year Ended June 30, 1942		129,324.90
Total Excess Profits Income		$164,856.06
Income Proposed With Regard to Section 722:		
1941	$187,871.38	375,742.76
1942	187,871.38	
Total Carry-Over		$210,886.70
Excess Profits Net Income For 1943		$222,295.66
Deduct—		
Excess Profits Credit	$187,871.38	
Specific Exemption	5,000.00	
Unused Excess Profits Credit As Shown Above With Regard to Section 722	210,886.70	403,758.08
Excess Profits Net Income for 1943		None

Note

Pages 11, 13, 25, 35, 37, 51, and 53 are on Card 2;
All pages not present are blank.

[fol. 15] (Part of Exhibit C)

Explanation attached to Form 991 filed with the Commissioner of Internal Revenue September, 1943 for the May Seed and Nursery Company and/or Earl E. May Seed Company, of Shenandoah, Iowa.

Taxpayer claims the existing excess profits tax, without regard to Section 722, excessive and discriminatory as asserted in Schedule B and C of Form 991 attached hereto, for the reasons set forth therein. These reasons are truly applicable to the taxpayer and as a basis for this contention, the following pertinent circumstances and conditions are summarized below:

1. The taxpayer made plans prior to the end of the base period to curtail advertising and promotional expenses as a result of change in management, as follows:

a. Restrictions of outlay for advertising to approximate 5% of sales rather than about twice that amount in earlier years.

b. The corporation discontinued the operation of a radio broadcasting department immediately prior to the close of the base period.

2. Prior to the close of the base period, the taxpayer was engaged in the development and sale of hybrid seed corn which had not reached its level of output until after the base period, and therefore the base period is not regarded as a fair standard for normal earnings.

3. The corporation through change in management and policy, discontinued the operation of a radio broadcasting station during April, 1940 through committments entered into prior to December 31, 1939, and operations reflect a large loss from the development and operation of this radio department, particularly during the base period. It is contended for this purpose, that the operating loss and the development cost included in its tax return, should be omitted entirely in determining a normal standard of earnings. The radio operations immediately became profitable upon incorporation through change in management and new net work hook-up, through committments made prior to the close of the base period.

4. The operations of the taxpayer as reported for the fiscal year ended June 30, 1937, on its tax return, included a loss of $4,597.14 regarding radio transmitter equipment junked which is believed to be excludable from base period operations under another section of the law, but pointed out therein as an explanation for your department's guidance in the treatment of this item.

5. As a result of conditions beyond its control during the base period, unusual operating losses were incurred, and with the assistance of the unusual and peculiar events outlined herein, the taxpayer is in hopes of reconstructing its earnings to show reasonable profits. The operating results as shown by tax returns for the base years of taxpayer are set forth below:

Fiscal Year Ended June 30	Net Sales	Taxable Income or (Loss)
1937	$1,670,524.65	$12,442.31
1938	1,549,227.27	(21,832.35)
1939	1,117,502.47	(78,405.95)
1940	1,211,931.24	19,017.38

Figures enclosed in parenthesis ( ) appear in RED on the original.

[fol. 16] To say that such operating results are normal, in view of the losses sustained, is very erroneous. The use of such a basis as a standard for excess profits would therefore be confiscatory.

6. The business of the taxpayer is of such class that even invested capital is not considered as a fair standard for excess profits tax purposes, because of the following conditions:

a. Capital is not an all important and material income-producing factor.

b. The invested capital of the taxpayer is abnormally low.

c. The inclusion of intangible assets consisting of goodwill, development costs, etc. on a fair basis, while worthy of claim in this connection, is not deemed adequate to encourage the taxpayer to accept the invested capital basis. However, in this claim, such additional values are considered and presented as a matter of protection.

The following facts are submitted at this point to familiarize your department with taxpayer's business in connection with submitting proof of the merits of its contentions in this issue.

The May Seed and Nursery Company was incorporated on January 1, 1919 with an invested capital of $50,000.00. In 1920 the capital was increased to $150,000,00 and in 1930 to $250,000.00. Considerable additional capital was provided in view of operating deficits through loans by the major stockholders and eventually these loans were converted into preferred stock, a great part of which is now outstanding. The present capital stock of the corporation consists of $159,900.00 of 5% preferred stock and 1,235 shares of no par common stock without stated value. The common stock paid in originally, totaled $123,500.00 and a major stockholder contributed $50,914.43 as paid in surplus.

During the early twenties, the May Seed Company entered into radio broadcasting and operated KMA, a broadcasting station, as a separate department of the business. The business previously consisted largely of the sale of farm and garden seed and nursery stock through mail order and chain store distribution. These stores were located in numerous cities throughout Iowa and surrounding midwestern states.

As previously stated, the taxpayer developed a hybrid seed corn product prior to the close of the base period and added this product to its mail order and chain store distribution during the latter part of the base period. The addition of this item of hybrid seed corn did not add materially to the cost of distribution in long established chain stores and the taxpayer normally expects at least $125,000.00 net income annually from the sale of hybrid seed corn alone. [fol. 17] Fixed charges in these stores were met with the sale of the other products dealt in previously, with the result that this new product of hybrid seed corn has been responsible for a stable but lucrative increase in income.

Hybrid seed corn is now planted almost exclusively in the Middle West, particularly in Iowa. The taxpayer has spent millions of dollars in advertising in building up its good-will, name and reputation as a leader in the farm and

garden seed field. While this money over a period of time appears to have been partially well spent by being one of the leaders in the seed industry, the operating results had been disappointing up until the time of the change in policy and general management on or about the fall of 1938.

It will be interesting to note the experience of this taxpayer over a period of the last several years to see that in spite of large volume of business transacted, a substantial operating loss has been sustained and only until after the base period did the taxpayer through new methods and new products, reach a fraction of its potential operating profits:

Particulars	Profit or (Loss) Before Income Taxes
Deficit Accumulated to June 30, 1928	($ 94,339.28)
Fiscal Year Ended June 30	
1929	2,403.97
1930	4,969.94
1931	28,590.69
1932	(20,865.33)
1933	(27,807.22)
1934	4,704.80
1935	72,173.50
1936	(1,165.82)
1937	12,442.31
1938	(21,832.35)
1939	(78,405.95)
1940	19,017.38
1941	94,268.50
1942	134,734.91
1943	263,427.05

Figures enclosed in parenthesis ( ) appear in RED on the original.

The operations of the business up to the time of the new management in the fall of 1938, and policies in force had resulted in a net operating deficit. These new policies could not be effected in the first year (fiscal year ended June 30, 1939) of the new management due to prior committments. However, the effect of curtailment of advertising, new methods, discontinuance of the radio department and the development and sale of the new hybrid seed corn product [fol. 18] can be seen definitely after July 1, 1939. It follows therefore, that these improvements were not due to

economic conditions generally as a result of the world war, but to the effect of new methods and management, without the requirement of additional capital.

Advertising and Promotional Economies

The following is a summary of the revelation of advertising to total sales beginning with the base period and up to June 30, 1943:

Fiscal Year Ended June 30	Advertising			Net Sales	% to Net Sales	
	Catalogue	Other	Total		Including Radio Loss	Excluding Radio Loss
1937	$ 52,538.95	$114,953.17*	$167,492.12	$ 1,670,524.65	10.00%	8.03%
1938	79,264.60	174,801.85*	254,066.45	1,549,227.67	16.40	14.61
1939	87,427.92	49,961.05*	137,388.97	1,117,502.47	12.29	11.31
1940	40,904.31	32,826.33*	73,730.64	1,211,931.24	6.08	5.83
1941	72,502.26	36,555.89	109,058.15	1,462,631.15	7.46	7.46
1942	64,267.56	42,844.94	107,112.50	2,233,922.81	4.79	4.79
1943	57,088.63	42,999.07	100,087.70	2,923,742.53	3.42	3.42
Total	$453,994.23	$494,942.30	$948,936.53	$12,169,482.52	7.80	7.80
7 Year Average	$ 64,856.32	$ 70,706.04	$135,562.36	$ 1,738,497.50	7.80	7.80

* Includes radio department loss as follows:

1937	$33,023.00
1938	27,770.80
1939	11,016.87
1940	3,111.13
Total	$74,921.80

It will be noted from the foregoing that advertising costs were curtailed during the year 1939. The taxpayer believes that the non-recurring charges of excessive advertising and catalogue expenses should be excluded in reconstructing a normal operating result during the base period. The management is of the opinion that 5% is a fair standard of expense for advertising and catalogue expenses. The experience from new management and new products in the years after 1939 is believed to justify the management's estimate of not more than 5% of net sales.

On the basis of 5% normal advertising costs, in relation to sales, it is proposed that normal tax deductions for such costs be reconstructed during the base years as follows:

[fol. 19]

Fiscal Year	Net Sales	Advertising Excluding Radio Loss	5% Proposal	Reduction Excluding Radio Loss
1937	$1,670,524.65	$134,469.12	$ 83,526.23	$ 50,942.89
1938	1,549,227.67	226,295.65	77,461.38	148,834.27
1939	1,117,502.47	126,372.10	55,875.12	70,496.98
1940	1,211,931.24	76,619.51	60,596.56	10,022.95
Totals	$5,549,186.03	$557,756.38	$277,459.29	$280,297.09

Hybrid Seed Corn

The United States Department of Agriculture and various State Agricultural Schools have been experimenting with hybrid seed corn for over twenty years. However, this type of seed corn has not been produced in a commercial way except in the last ten years. The basis of hybrid corn is the combination of inbred lines. These inbred lines are established through many years of inbreeding of open-pollinated varieties, single crosses or double crosses. Once the characteristics of inbred lines have been thoroughly established by inbreeding, the inbreds must be combined to form single crosses, and these crosses crossed to produce double crosses. These double crosses produce the hybrid seed corn offered for sale to the farmer.

During the two or three years of development of hybrid seed corn, the taxpayer purchased high grades of hybrid seed corn and sold them to its customers until such time as it had developed a quality product. It will be interesting to observe at this point, the acceptance by corn growers of the new hybrid seed corn. We have obtained and submit below, a schedule setting forth the ratio of acres of hybrid seed corn to the acres of total corn planted in the states of Iowa, Illinois, Missouri, and Nebraska.

Percent of Hybrid Corn Acres to Total Corn Acres

Year	Iowa	Illinois	Missouri	Nebraska
1937	30.7%	25.2%	.6%	2.5%
1938	51.9	47.5	1.8	6.8
1939	73.4	65.5	12.1	12.7
1940	90.3	76.4	26.9	24.9
1941	96.9	86.9	46.7	36.5
1942	98.9	93.3	60.1	51.4
1943	99.0	96.0	71.1	63.0

[fol. 20] The acceptance of hybrid corn by growers in the corn belt noted above, is not due to war conditions as these states are the major producers at any time.

The taxpayer began its development of hybrid corn before the close of the base period. Departmental records of sales and costs of sales from 1941. However, the following information has been developed:

	Bushels Sold		Average Selling Price Per Bushel		Gross Sales	
Fiscal Year Ended June 30	Purchased	Produced	Purchased	Produced	Purchased	Produced
1940	15,265	—				
1941	27,624	8,231	$5.55	$6.00	$153,313.20	$ 49,386.00
1942	33,261	33,084	6.00	6.55	199,566.00	216,567.00
1943	14,203	67,830	5.75	7.10	81,667 25	481,593.00

Bushels purchased and sold in 1938 and 1939 estimated at 5000 and 12000 respectively.

An analysis of the operating results of the hybrid seed corn department for the last two years is noted below:

	Fiscal Year Ended June 30	
Particulars	1942	1943
Net Sales	$396,063.72	$535.221.93
Cost of Goods Sold	277,039.71	343,546.98
Gross Profit	$119,024.01	$191,674.95
% to Net Sales	30.05%	35.81%
Expenses	57,497.90	89,754.05
Net Profit Before Income Taxes	$ 61,526.11	$101,920.90
% to Net Sales	15.53%	19.04%

Taxpayer here asserts that it has not yet reached its level of normal sales of hybrid seed corn, its most profitable line of seeds, and for the purpose of excess profits credit estimates its normal net income from this department alone will be not less than $125,000.00 annually. Executives estimate the normal sales of 100,000 bushels per annum to produce sales of $700,000.00 on which the net profit should aggregate approximately $130,000.00.

[fol. 21] Radio Station Operations

Taxpayer prior to the close of the base period discontinued radio station KMA as an operating department,

through committments made prior to the close of business December 31, 1939 by the sale of the physical assets used by the radio station, to the organizers of a separate corporation. During the period from 1924 to April, 1940, taxpayer experienced considerable operating losses in developing the radio business. A part of these development and operating costs were reflected in the tax returns of the May Seed and Nursery Company during the base period which are set forth below for this purpose:

Fiscal Year Ended June 30	Operating Loss
1937	$33,023.00
1938	27,770.80
1939	11,016.87
1940	3,111.13
Total Exclusion from Base Years	$74,921.80

It is conclusive that these operating losses should be removed entirely in determining a fair standard of earnings for the May Seed and Nursery Company, because it is now a profitable enterprise. This position was accomplished through change in management and joining a National net-work of broadcasting stations. As a result of definite committments entered into before the close of the base period, the May Broadcasting Company, successor to the KMA Broadcasting station, has shown substantial profits since organization of that corporation.

Invested Capital Low

With regard to the assertion that capital is not a material income-producing factor, it should be pointed out that the mail order business requires advanced payments in most instances, and the stores operate for cash. Therefore, a large amount of capital is not required in the conduct of the taxpayer's business and the margin of profits are unusually large under normal conditions. However, as a matter of protection in this claim, development costs and goodwill in the trade through extensive advertising programs over a period of years and fair treatment of the customers

[fol. 22] should be considered. If required, the taxpayer can submit evidence of these intangible values as an addition to the rigid provisions of invested capital method, which basis is inadequate.

Summary

Taxpayer has set forth previously the basis and fairness of reconstructing earnings within the spirit and meaning of Section 722 of the Internal Revenue Code for the base years. A showing has never been made of the base period operating results in Excess Profits Tax Return filed for the fiscal years ended June 30, 1941, 1942 and 1943. Details of the operations, which have been prepared from tax returns of those years, are shown in Exhibit "A" attached hereto. A summary of these results is noted below, together with the amendments as a result of this claim:

Particulars					
Net Income or (Loss) Per Tax Return	$ 12,442.31	($ 21,832.35)	($ 78,405.95)	$ 19,017.38	($ 68,778.61)
Amendments:					
Equipment Loss—Junked	4,597.14				4,597.14
Radio Dept. Loss	33,023.00	27,770.80	11,016.87	3,111.13	74,921.80
Non-Recurring Excess Adv.	50,942.89	148,834.27	70,496.98	10,022.95	280,297.09
Hybrid Seed Corn Normal Profits	125,000.00	125,000.00	125,000.00	125,000.00	500,000.00
Reconstructed Base Period Earnings	$226,005.34	$279,772.72	$128,107.90	$157,151.46	$791,037.42
Annual Average					$197,759.35
95% of Total as Excess Profits Credit					$187,871.38

Figures enclosed in parenthesis ( ) appear in RED on the original.

Conclusion

Taxpayer respectfully requests an oral conference with the representatives of your department at which time any additional evidence or information desired in connection with this claim will be made available by the taxpayer.

Respectfully submitted,

MAY SEED & NURSERY COMPANY.

[fol. 23] Affidavit

State of Iowa,
County of Page—ss.:

I, E. S. Welch, Treasurer of Earl E. May Seed and Nursery Company and/or May Seed and Nursery Company of Shenandoah, Iowa, familiar with its affiairs, on oath do depose and say that I have read the foregoing statements and believe them to be true and complete to the best of my knowledge and belief.

.....

Subscribed to and sworn before me the .... day of September, 1943.

.....

Notary in and for Page County, Iowa.

Affidavit Of Agent

I, John S. Oden, on oath do depose and say that I have prepared the attached protest from information furnished me by the taxpayer which I believe to be true and complete to the best of my knowledge and belief.

JOHN S. ODEN.

State of Iowa,
County of Polk—ss.:

Subscribed to and sworn before me the 11 day of September, 1943.

MARY ANN BACHMAN
Notary in and for Polk County, Iowa.

Note

Pages 11, 13, 25, 35, 37, 51, and 53 are on Card 2;
All pages not present are blank.

AFFIDAVIT

We, the undersigned officers of the corporation for which this application is made, being duly sworn, each for himself deposes and says that the statements made herein (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete statements of facts made in good faith pursuant to the requirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

(Name)	(Title)
[CORPORATE SEAL]	
(Name)	(Title)

Subscribed and sworn to before me this _____ day of _____, 194__

(Signature of officer administering oath)

(Title)

U. S. GOVERNMENT PRINTING OFFICE 16—32832-1

Part of Exhibit C. 27

[fol. 26] (Answer of Commissioner of Internal Revenue).

(Filed September 30, 1953, The Tax Court of the United States).

Comes now the Commissioner of Internal Revenue, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations of paragraph 1.

2. Admits that the Commissioner determined a deficiency in income tax of $9,730.18 and an overassessment of Excess Profits tax of $31,387.69 for the fiscal year ended June 30, 1942. Denies the remaining allegations of paragraph 2.

3. Denies that the Commissioner erred as alleged in paragraph 3.

4. (a) Admits that the petitioner is a corporation organized under the laws of the state of Iowa on January 1, 1949 and has its principal office and place of business at Shenandoah, Iowa. Denies the remaining allegations of paragraph 4 (a).

(b) Admits that on September 15, 1943, petitioner filed an application for relief, form 991, under Section 722 of the Internal Revenue Code for the fiscal year 1942. Denies the remaining allegations of paragraph 4 (b).

[fol. 27] (c) Denies the allegations of paragraph 4 (c).

(d) Admits that in its application for relief, form 991, for the fiscal year 1942, a copy of which is attached to the petition as Exhibit "C," no computation of an unused credit from 1941 was attached to the application. Denies the remaining allegations of paragraph 4 (d).

(e) Denies the allegations of paragraph 4 (e).

(f) Denies the allegations of paragraph 4 (f).

(g) Admits that on April 3, 1952, petitioner and the Excess Profits Tax Council in Washington, D. C. agreed upon a Constructive Average Base Period Net Income for the taxable year ended June 30, 1942 in the amount of $96,900.00. Denies the remaining allegations of paragraph 4 (g).

(h) Denies the allegations of paragraph 4 (h).

(i) Denies the allegations of paragraph 4 (i).

(j) Denies the allegations of paragraph 4 (j).

5. Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

6. Further answering the petition the respondent, in the alternative, and affirmatively in support of an increased deficiency in income tax alleges as follows:

(a) The deficiency notice asserts a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69 for the taxable year ended June 30, 1942.

[fol. 28] (b) If the Court's opinion calls for any adjustment in whole or in part of petitioner's excess profits tax and such adjustment makes appropriate an increase in petitioner's income tax liability, then such increase should be reflected in the Court's decision.

Wherefore, it is prayed:

1. That the Court redetermine the deficiencies herein involved to be in the amounts determined by respondent.

2. That in the alternative as to the income tax, the Court determine any deficiency in income tax which may result from any adjustment relative to the excess profits tax liability and allow any resulting increased deficiency in income tax claim for which is hereby made pursuant to the provisions of Section 272 (e) of the Internal Revenue Code.

3. That the Court grant such other relief as respondent may be entitled to in the premises.

KENNETH W. GAMMILL,
Acting Chief Counsel,
Internal Revenue Service.

Of Counsel:
John A. Gilmore,
Regional Counsel.
Douglas L. Barnes,
Acting Appellate Counsel.
Ray H. Garrison,
Special Attorney,
Internal Revenue Service.
RHG:es 9-17-53

[fol. 29] Stipulation of Facts.

(Filed at Hearing at Chicago on November 29, 1954, The Tax Court of the United States).

It is stipulated and agreed by and between counsel for the respective parties hereto that the facts hereinafter stated are true and correct and that this stipulation may be offered in evidence by either party with the same force and effect as if the same were duly approved by the testimony of witnesses, reserving to each party the right to question the competency, materiality, and relevancy of any fact admitted herein and to offer further evidence not inconsistent herewith.

1. This proceeding originates by virtue of the petition filed with this Court by petitioner contesting the determination made by respondent in the statutory notice, mailed to petitioner on May 15, 1953, pursuant to sections 272 and 732 of the Internal Revenue Code of 1939. A true and correct copy of the statutory notice is attached to the petition and marked Exhibit "AA". For the purpose of this proceeding and in this stipulation of facts, Exhibit "A" attached to the petition shall be designated Exhibit "1-A".

2. Petitioner, an Iowa corporation, incorporated on January 1, 1919, has its principal office at Shenandoah, Iowa, where it engages in a farm seed and supply business. Petitioner filed its return for the fiscal year ended June 30, 1942 with the Collector of Internal Revenue for the district [fol. 30] of Iowa, at Des Moines, Iowa.

3. Petitioner filed a tentative excess profits tax return for the year ended June 30, 1942 on September 15, 1942, having on September 14, 1942 been duly granted an extension to file its return until October 15, 1942.

4. On October 15, 1942 petitioner filed its excess profits tax return for the year ended June 30, 1942.

5. By consents duly executed between the petitioner and the Commissioner of Internal Revenue the parties extended until June 30, 1947, the period within which the Commissioner could assess any deficiencies in income, excess profits tax, or war profits tax for the year ended June 30, 1942.

6. On September 15, 1943 petitioner filed applications for relief, Form 991, under section 722 of the Internal Revenue Code of 1939, for the fiscal years ended June 30, 1942 and June 30, 1943. Attached hereto and made a part hereof as Exhibit "2-B", is a photostatic copy of the application for the year ended June 30, 1942. Attached to the petition as Exhibit "B" is a true and correct copy of a schedule attached to petitioner's application for relief for the fiscal year ended June 30, 1943. For the purpose of this proceeding and in this stipulation of facts, Exhibit "B" attached to the petition shall be designated Exhibit "3-C".

7. The constructive average base period net income of $187,871.38 claimed by petitioner in its application for relief, Form 991, for the fiscal year ended June 30, 1942, exceeded its excess profits net income for the fiscal year ended June 30, 1942.

[fol. 31] 8. On October 26, 1948 the Internal Revenue Agent in Charge, Omaha, Nebraska, mailed to petitioner the Revenue Agent's Report on Section 722, dated October 8, 1948. A copy of the transmittal letter from the Internal Revenue Agent in Charge it attached hereto and marked Exhibit "4-D". A copy of the first page of the Revenue Agent's transmittal is attached hereto and marked Exhibit "5-E".

9. On April 3, 1952, petitioner's representative executed an agreement, Form EPC-1. A photostatic copy of the agreement is attached hereto as Exhibit "6-F".

10. On June 16, 1952, Robert W. Andrews, the Co-ordinator, Excess Profits Tax Council, approved the determination of the constructive average base period net income determined by the Excess Profits Tax Council. A copy of the first two pages of the Excess Profits Tax Council's determination is attached hereto as Exhibit "7-G".

11. Subsequent to June 16, 1952 and prior to the issuance of the statutory notice referred to as Exhibit "1-A", the decision of the Excess Profits Tax Council was transmitted to the Internal Revenue Agent in Charge, Omaha, Nebraska. A copy of the letter transmitting the decision of the Excess Profits Tax Council is attached hereto as Exhibit "8-H".

12. The Commissioner of Internal Revenue determined a deficiency in income tax of $9,730.18 and an overassessment of excess profits tax of $31,387.69 for the fiscal year ended June 30, 1942. The overassessment of excess profits tax as set forth in the Exhibit "1-A" results from the partial allowance of petitioner's claim for relief under section 722, Internal Revenue Code of 1939. The income tax deficiency results from the overassessment in petitioner's excess profits tax based on an allowance under section 722, Internal Revenue Code of 1939. The constructive average [fol. 32] base period net income used to determine petitioner's excess profits tax liability for the year ended June 30, 1942 is $96,900.00 as determined by the Excess Profits Tax Council.

13. Under date of June 25, 1952 the Internal Revenue Agent in Charge, Omaha, Nebraska, mailed to petitioner the tax computations for the fiscal years ended June 30, 1942 through June 30, 1946, based on the constructive average base period net income determined by the Excess Profits Tax Council. A copy of the transmittal letter, together with the first three pages of the computation, is attached hereto as Exhibit "9-I".

14. In determining the overassessment of excess profits tax for the year ended June 30, 1942, respondent did not allow petitioner the benefit of an unused excess profits tax credit based on a constructive average base period net income from the year ended June 30, 1941, for the reason (as stated in Exhibit "1-A"), ". . . that no claim for such credit carryover was made on the application for relief filed for the year ended June 30, 1942."

15. Petitioner alleges that it is entitled to the benefits of an unused excess profits tax credit carry-over for the year ended June 30, 1942, based on a constructive average base period net income of $58,200.00 for the year ended June 30, 1941.

16. If petitioner is entitled to use, for the year ended June 30, 1942, an unused excess profits tax credit carryover based on a constructive average base period net income for the year ended June 30, 1941, it is stipulated and

agreed that this constructive average base period net income shall be $58,200.00.

[fol. 33] 17. If petitioner is entitled to the benefits of an unused excess profits tax credit carry-over for the year ended June 30, 1942, based on a constructive average base period net income of $58,200.00 for the year ended June 30, 1941, then petitioner's excess profits tax liability for the fiscal year ended June 30, 1942 is $5,508.59 and petitioner's income tax liability is $38,739.42.

18. In connection with this proceeding it is agreed that the Court may take judicial notice of all treasury regulations issued in connection with section 722, Internal Revenue Code of 1939 and that either party may refer to these regulations on brief.

19. On May 8, 1943, Regulations 109 were amended by TD 5264; 1943 CB 761-793.

20. On July 21, 1944, Regulations 112 and Regulations 109 were amended by TD 5393; 1944 CB 415-423.

DENVER A. BUSBY,
Counsel for Petitioner

DANIEL A. TAYLOR
Chief Counsel
Internal Revenue Service Counsel for
Respondent.

[fol. 33a] Exhibits 1-A and 3-C

For Exhibits "1-A And 3-C" Attached To Stipulation Of Facts, See Exhibits "A And B" Attached To Petition

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Note

Pages 11, 13, 25, 35, 37, 51, and 53 are on Card 2;

All pages not present are blank.

[fol. 36] Part of Exhibit 2-B.

Explanation Attached To Form 991 Filed With The Commissioner Of Internal Revenue September, 1943 For The May Seed And Nursery Company And/Or Earl E. May Seed Company, Of Shenandoah, Iowa.

Taxpayer claims the existing excess profits tax, without regard to Section 722, excessive and discriminatory as asserted in Schedule B and C of Form 991 attached hereto, for the reasons set forth therein. These reasons are truly applicable to the taxpayer and as a basis for this contention, the following pertinent circumstances and conditions are summarized below:

1. The taxpayer made plans prior to the end of the base period to curtail advertising and promotional expenses as a result of change in management, as follows:

a. Restrictions of outlay for advertising to approximate 5% of sales rather than about twice that amount in earlier years.

b. The corporation discontinued the operation of a radio broadcasting department immediately prior to the close of the base period.

2. Prior to the close of the base period, the taxpayer was engaged in the development and sale of hybrid seed corn which had not reached its level of output until after the base period, and therefore the base period is not regarded as a fair standard for normal earnings.

3. The corporation through change in management and policy, discontinued the opeation of a radio broadcasting station during April, 1940 through committments entered into prior to December 31, 1939, and operations reflect a large loss from the development and operation of this radio department, particularly during the base period. It is contended for this purpose, that the operating loss and the development cost included in its tax return, should be omitted entirely in determining a normal standard of earnings. The radio operations immediately became profitable upon incorporation through change in management and new net work hook-up, through committments made prior to the close of the base period.

4. The operations of the taxpayer as reported for the fiscal year ended June 30, 1937, on its tax return, included a loss of $4,597.14 regarding radio transmitter equipment junked which is believed to be excludable from base period operations under another section of the law, but pointed out therein as an explanation for your department's guidance in the treatment of this item.

5. As a result of conditions beyond its control during the base period, unusual operating losses were incurred, and with the assistance of the unusual and peculiar events outlined herein, the taxpayer is in hopes of reconstructing its earnings to show reasonable profits. The operating results as shown by tax returns for the base years of taxpayer are set forth below:

Fiscal Year Ended June 30	Net Sales	Taxable Income or Loss
1937	$1,670,524.65	$12,442.31
1938	1,549,227.27	21,832.35
1939	1,117,502.47	78,405.95
1940	1,211,931.24	19,017.38

[fol. 37] To say that such operating results are normal, in view of the losses sustained, is very erroneous. The use of such a basis as a standard for excess profits would therefore be confiscatory.

6. The business of the taxpayer is of such class that even invested capital is not considered as a fair standard for excess profits tax purposes, because of the following conditions:

a. Capital is not an all important and material income producing factor.

b. The invested capital of the taxpayer is abnormally low.

c. The inclusion of intangible assets consisting of goodwill, development costs, etc. on a fair basis, while worthy of claim in this connection, is not deemed adequate to encourage the taxpayer to accept the invested capital basis. However, in this claim, such additional values are considered and presented as a matter of protection.

The following facts are submitted at this point to familiarize your department with taxpayer's business in connection with submitting proof of the merits of its contentions in this issue.

The May Seed and Nursery Company was incorporated on January 1, 1919 with an invested capital of $50,000.00. In 1920 the capital was increased to $150,000.00 and in 1930 to $250,000.00. Considerable additional capital was provided in view of operating deficits through loans by the major stockholders and eventually these loans were converted into preferred stock, a great part of which is now outstanding. The present capital stock of the corporation consists of $159,900.00 of 5% preferred stock and 1,235 shares of no par common stock without stated value. The common stock paid in originally, totaled $123,500.00 and a major stockholder contributed $50,914.43 as paid in surplus.

During the early twenties, the May Seed Company entered into radio broadcasting and operated KMA, a broadcasting station, as a separate department of the business. The business previously consisted largely of the sale of farm and garden seed and nursery stock through mail order and chain store distribution. These stores were located in numerous cities throughout Iowa and surrounding midwestern states.

As previously stated, the taxpayer developed a hybrid seed corn product prior to the close of the base period and added this product to its mail order and chain store distribution during the latter part of the base period. The addition of this item of hybrid seed corn did not add materially to the cost of distribution in long established chain stores and the taxpayer normally expects at least $125,000.00 net income annually from the sale of hybrid seed [fol. 38] corn alone. Fixed charges in these stores were net with the sale of the other products dealt in previously, with the result that this new product of hybrid seed corn has been responsible for a stable but lucrative increase in income.

Hybrid seed corn now planted almost exclusively in the Middle West, particularly in Iowa. The taxpayer has

Form 991
U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised January 1943)

EXHIBIT "C"

APPLICATION FOR RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

(To be executed and filed in duplicate)

May Seed and Nursery Company and/or Earl May Seed Company of Shenandoah, Iowa
(Name of corporation) (Address of corporation)

hereby makes application for relief under section 722 of the Internal Revenue Code with respect to its excess profits tax taxable year indicated below, and in support of such application submits the following information:

1. Date of incorporation January 1, 1919 2. State or country Iowa

3. Excess profits tax taxable year for which the benefits of section 722 are claimed Fisc l Year ended June 30, 1942

4. Collection district in which the excess profits tax return for the year was filed Iowa

5. Date filed Tentative 9-15-42; period of extension, if any, granted for filing return October 15, 1942

6. Excess profits tax shown upon the excess profits tax return for the year $ 40,849.36
(Computed prior to the deferment under section 710 (a) (5), to the foreign tax credit under section 729, to the credit for debt retirement under section 783, and to the adjustment under section 734.)

7. Excess profits tax computed after application of section 722 $ none
(Computed prior to the deferment, to the credits and to the adjustment as provided in line 6.)

8. Reduction in tax under section 722 (line 6 minus line 7) $ 40,849.36

9. Adjusted excess profits net income computed without regard to section 722 $

10. Normal-tax net income computed without the credit provided in section 26 (e) for income subject to excess profits tax $

No Tax Payable Under Proposal relating to Section 722

11. Percentage which line 9 is of line 10 %

12. If line 11 exceeds 50 percent, amount of tax deferred under section 710 (a) (5) (33 percent of line 8) (enter as item 17, page 1, Form 1121) $

13. Total net relief claimed with respect to tax shown on return (line 8 minus line 12) $ 40,849.36

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed $ 40,849.36

15. Amount of refund or credit for which this application is a claim (see Instruction III) $ 40,849.36

IF APPLICATION FILED AS A RESULT OF DEFICIENCY

16. Excess profits tax shown in preliminary notice or notice of deficiency $ Not Applicable

17. Excess profits tax after application of section 722 $ " "

18. Reduction in tax under section 722 (line 16 minus line 17) $ " " [2]

[1] If any adjustments have been made subsequent to the filing of the return, enter the adjusted amount.
[2] Amount of reduction of tax may not exceed deficiency finally determined without reference to section 722.

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Exhibit C.

11

SCHEDULE A—CONSTRUCTIVE BASE PERIOD NET INCOME

1. Has an application for a constructive average base period net income been made for a prior taxable year? ---Yes---

   If so, state year or years ---Fiscal Years ended June 30, 1943

2. Has a constructive average base period net income been finally determined and used in connection with a prior taxable year? ---No---

3. If answer to line 2 is "yes," state:

   (*a*) Amount determined for use in computing excess profits tax for prior year ..... $---Not Applicable

   (*b*) Year for which constructive average base period net income used in computing excess profits tax .....

   (*c*) Date of determination of constructive average base period net income .....

   (*d*) By whom determination was made .....

   (*e*) Reason for claim for constructive average base period net income for use in the taxable year other than the amount set forth in (*a*) (attach statement).

   (*f*) In the case of an affiliated group filing consolidated excess profits tax returns, have any new members been acquired by the group, or have any former members departed from the group after the date upon which such constructive average base period net income was determined? ..... If answer is "yes," attach particulars.

4. Excess profits net income or deficit in excess profits net income for each taxable year in the base period, computed without regard to section 722.

Year	*Amount*
6-30-37	$ 17,039.45*
6-30-38	($ 21,832.35)
6-30-39	($ 78,405.95)
6-30-40	$ 14,017.38
Total	($ 64,181.47)

* Adjusted to reinstate earnings reduced by loss on sale of radio equipment junked

5. Average base period net income determined without regard to section 722 ..... $---None---
   (*a*) Is the benefit of section 713 (e) (1) (relating to exclusion of deficit or to increase in lowest year in base period) claimed? ---Yes, if on reconstructed base only---
   (*b*) Is the benefit of section 713 (f) (relating to increased earnings in last half of base period) claimed? .....
   (*c*) If answer to (*a*) or (*b*) is "yes," furnish computation.

6. Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year. (Furnish particulars supporting amount claimed and details involved in computation.) ---Statements Attached--- $---157,871.38---

7. Has Supplement A been availed of in determining average base period net income? ---No--- Has a separate constructive average base period net income been finally determined for any component prior to the time this application is made? ---No--- Attach schedule showing former names, addresses, and all pertinent information for each component corporation for each year of existence necessary to determination of application of section 722.

8. (*a*) If business was commenced during base period or after December 31, 1939, is business a continuation in whole or in part of a previously existing business? ---See statements attached---
   (*b*) If answer to (*a*) is "yes," furnish particulars.

9. (*a*) Is the taxpayer a member of an affiliated group making a consolidated excess profits tax return? ---No---
   (*b*) If the answer to (*a*) is "yes," is the affiliated group filing a consolidated excess profits tax return making application for relief under section 722? ----------
   Not applicable
   (*c*) If answer to (*a*) and (*b*) is "yes," state:
   (1) First taxable year for which a consolidated excess profits tax return was made .....
   (2) Whether a constructive average base-period net income has been finally determined for any member of the group .....
   (3) Names and addresses of each member of the group, and furnish all pertinent information necessary to determine constructive average base period net income of such group.

10. If the taxpayer came into existence after December 31, 1939, state date after which capital additions and capital reductions were not taken into account in computing constructive average base period net income ---Not applicable---

11. If the benefits of section 711 (a) (1) (I) or 711 (a) (2) (K) (relating to nontaxable income of certain industries with depletable resources) are claimed, attach schedule showing the computation of, and state the fair and just amount of:

    (*a*) Normal output during the base period as defined in section 735 (a) (5) ---Not applicable---

    (*b*) Normal unit profit as defined in section 735 (a) (9), $..... per .....

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Exhibit C.

FIGURES ENCLOSED IN PARENTHESIS ( ) APPEAR IN RED ON THE ORIGINAL.

SCHEDULE B—TAXPAYERS ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A, if the taxpayer computes its average base period net income pursuant to Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☒ 1. Normal production, output, or operation was interrupted during the base period because of unusual and peculiar events (section 722 (b) (1)). See statements attached

(*a*) Describe the events and time of occurrence.

(*b*) State taxable years in the base period during which production, output, or operations were affected.

☒ 2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events (section 722 (b) (2)).

(*a*) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member. See statements attached

(*b*) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.

3. The business of the taxpayer was depressed in the base period because of membership in an industry affected by conditions subjecting the taxpayer to:

☐ A profits cycle differing materially from the general business cycle (section 722 (b) (3) (A)), or

☐ Sporadic and intermittent periods of profits inadequately represented in the base period (section 722 (b) (3) (B)). See statements attached

(*a*) Describe character of the industry and furnish names and addresses of other members of the industry.

(*b*) Furnish data establishing that the taxpayer was depressed by reason of an unusual profits cycle, or

(*c*) Furnish data establishing that the taxpayer was depressed by reason of realization of sporadic profits inadequately represented in the base period.

☒ 4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (section 722 (b) (4)).

(*a*) On what date did commencement of business or change in character of business occur? Fall of 1935

(*b*) If change in character of the business has occurred, submit statement of:

(1) Nature of change in character of business. See statements attached

(2) Portion of the definition in section 722 (b) (4) within which such change is claimed to have occurred.

(3) Evidence supporting contention that average base period net income does not reflect normal operations for the entire base period.

(*c*) Did the business reach, by the end of the base period, the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, 2 years prior to the time the commencement or change occurred? No See schedule attached If answer is "no," furnish particulars. See statements attached

(*d*) Was change in capacity for production or operation of business consummated during a taxable year ending after December 31, 1939, as a result of a course of action to which taxpayer was committed prior to January 1, 1940? Yes

(*e*) If answer to (*d*) is "yes": See statements attached

(1) State date upon which such change was consummated and extent to which income for such year reflects such change.

(2) Submit evidence of commitment to a course of action prior to January 1, 1940.

(3) Attach schedule showing net capital addition or net capital reduction (section 713 (g) (1) or (2)) and the amount of money or property expended after the beginning of the first excess profits tax taxable year under the Internal Revenue Code in changing the capacity for production or operation of the business.

☐ 5. Other factors producing an average base period net income which is an inadequate standard of normal earnings and which are not inconsistent with the principles and limitations of section 722 (b) (section 722 (b)(5)).

(*a*) Describe other factors claimed to affect business during the base period and to result in an average base period net income which is an inadequate standard of normal earnings. See statements attached

SCHEDULE C—TAXPAYERS NOT ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer not entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☐ 1. The business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income (section 722 (c) (1)).

(*a*) Describe character of intangible assets.

(*b*) State names and addresses of other corporations believed to be in the same class of business where intangible assets of a similar character make important contributions to income.

☐ 2. The business of the taxpayer is of a class in which capital is not an important income-producing factor (section 722 (c) (2)).

(*a*) Describe nature of the business and explain why capital is not an important income-producing factor.

(*b*) State names and addresses of other corporations believed to be in the same class of business in which capital is not an important income-producing factor.

☐ 3. The invested capital of the taxpayer is abnormally low (section 722 (c) (3)).

(*a*) Describe circumstances causing invested capital to be abnormally low.

Part of Exhibit C.

Exhibit 2-B.

EXHIBIT "2 - B"

Form 991
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised January 1943

APPLICATION FOR RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

22645

(To be executed and filed in duplicate)

RECEIVED
SEP 15 1943
TREASURY DEPARTMENT

May Seed and Nursery Company and/or Earl of E. May Seed Company of Shenandoah, Iowa
(Name of corporation) (Address of corporation)

hereby makes application for relief under section 722 of the Internal Revenue Code with respect to its excess profits tax liability for the taxable year indicated below, and in support of such application submits the following information:

1. Date of incorporation January 1, 1919 2. State or country Iowa

3. Excess profits tax taxable year for which the benefits of section 722 are claimed Fiscal Year ended June 30, 1942

4. Collection district in which the excess profits tax return for the year was filed Iowa

5. Date filed 9-15-42; period of extension, if any, granted for filing return October 15, 1942

6. Excess profits tax shown upon the excess profits tax return for the year $ 40,849.36
(Computed prior to the deferment under section 710 (a) (5), to the foreign tax credit under section 729, to the credit for debt retirement under section 788, and to the adjustment under section 734.)

7. Excess profits tax computed after application of section 722 $ None
(Computed prior to the deferment, to the credits and to the adjustment as provided in line 6.)

8. Reduction in tax under section 722 (line 6 minus line 7) $ 40,849.36

9. Adjusted excess profits net income computed without regard to section 722 $

Normal-tax net income computed without the credit provided in section 26 (e) for income subject to excess profits tax $

No Tax Payable Under Proposal Relating to Section 722

11. Percentage which line 9 is of line 10 %

12. If line 11 exceeds 50 percent, amount of tax deferred under section 710 (a) (5) (83 percent of line 8) (enter as item 17, page 1, Form 1121) $ -

13. Total net relief claimed with respect to tax shown on return (line 8 minus line 12) $ 40,849.36

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed $ 40,849.36

15. Amount of refund or credit for which this application is a claim (see Instruction III) $ 40,849.36

IF APPLICATION FILED AS A RESULT OF DEFICIENCY

16. Excess profits tax shown in preliminary notice or notice of deficiency $ Not Applicable

17. Excess profits tax after application of section 722 $

18. Reduction in tax under section 722 (line 16 minus line 17) $

[1] If any adjustments have been made subsequent to the filing of the return, enter the adjusted amount.
[2] Amount of reduction of tax may not exceed deficiency finally determined without reference to section 722.

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Exhibit 2-B.

SCHEDULE A—CONSTRUCTIVE BASE PERIOD NET INCOME

1. Has an application for a constructive average base period net income been made for a prior taxable year? Yes

   If so, state year or years Fiscal Year Ended June 30, 1943

2. Has a constructive average base period net income been finally determined and used in connection with a prior taxable year? No

3. If answer to line 2 is "yes," state

   (a) Amount determined for use in computing excess profits tax for prior year $ Not Applicable

   (b) Year for which constructive average base period net income used in computing excess profits tax

   (c) Date of determination of constructive average base period net income

   (d) By whom determination was made

   (e) Reason for claim for constructive average base period net income for use in the taxable year other than the amount set forth in (a) (attach statement)

   (f) In the case of an affiliated group filing consolidated excess profits tax returns, have any new members been acquired by the group, or have any former members departed from the group after the date upon which such constructive average base period net income was determined? If answer is "yes," attach particulars.

4. Excess profits net income or deficit in excess profits net income for each taxable year in the base period, computed without regard to section 722.

	Year	Amount
	6-30-37	17,039.45*
	6-30-38	21,832.35
	6-30-39	78,405.95
	6-30-40	12,017.38
Total		64,181.47

* Adjusted to reinstate earnin s reduced by loss on sale of radio equipment junked

5. Average base period net income determined without regard to section 722 $ None

   (a) Is the benefit of section 713 (e) (1) (relating to exclusion of deficit or to increase in lowest year in base period) claimed? Yes, if on reconstructed base only

   (b) Is the benefit of section 713 (f) (relating to increased earnings in last half of base period) claimed? No

   (c) If answer to (a) or (b) is "yes," furnish computation

6. Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year. (Furnish particulars supporting amount claimed and details involved in computation.) Statements Attached $187,871.38

7. Has Supplement A been availed of in determining average base period net income? No Has a separate constructive average base period net income been finally determined for any component prior to the time this application is made? No Attach schedule showing former names, addresses, and all pertinent information for each component corporation for each year of existence necessary to determination of application of section 722

8. (a) If business was commenced during base period or after December 31, 1939, is business a continuation in whole or in part of a previously existing business? See statements attached

   (b) If answer to (a) is "yes," furnish particulars

9. (a) Is the taxpayer a member of an affiliated group making a consolidated excess profits tax return? No

   (b) If the answer to (a) is "yes," is the affiliated group filing a consolidated excess profits tax return making application for relief under section 722?

   (c) If answer to (a) and (b) is "yes," state Not applicable

   (1) First taxable year for which a consolidated excess profits tax return was made

   (2) Whether a constructive average base period net income has been finally determined for any member of the group

   (3) Names and addresses of each member of the group, and furnish all pertinent information necessary to determine constructive average base period net income of such group.

10. If the taxpayer came into existence after December 31, 1939, state date after which capital additions and capital reductions were not taken into account in computing constructive average base period net income Not applicable

11. If the benefits of section 711 (a) (1) (I) or 711 (a) (2) (K) (relating to nontaxable income of certain industries with depletable resources) are claimed, attach schedule showing the computation of, and state the fair and just amount of:

    (a) Normal output during the base period as defined in section 735 (a) (3) Not applicable

    (b) Normal unit profit as defined in section 735 (a) (9) $ per

Part of Exhibit 2-B.

SCHEDULE B—TAXPAYERS ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A, if the taxpayer computes its average base period net income pursuant to Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☒ 1. Normal production, output, or operation was interrupted during the base period because of unusual and peculiar events (section 722 (b) (1)). See statements attached

(a) Describe the events and time of occurrence.

(b) State taxable years in the base period during which production, output, or operations were affected.

☒ 2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events (section 722 (b) (2)) See statements attached

(a) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member.

(b) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.

3. The business of the taxpayer was depressed in the base period because of membership in an industry affected by conditions subjecting the taxpayer to:

☒ A profits cycle differing materially from the general business cycle (section 722 (b) (3) (A)), or See statements attached

☒ Sporadic and intermittent periods of profits inadequately represented in the base period (section 722 (b) (3) (B)).

(a) Describe character of the industry and furnish names and addresses of other members of the industry.

(b) Furnish data establishing that the taxpayer was depressed by reason of an unusual profits cycle, or

(c) Furnish data establishing that the taxpayer was depressed by reason of realization of sporadic profits inadequately represented in the base period.

☒ 4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (section 722 (b) (4)).

(a) On what date did commencement of business or change in character of business occur? Fall of 1936

(b) If change in character of the business has occurred, submit statement of

(1) Nature of change in character of business. See statements attached

(2) Portion of the definition in section 722 (b) (4) within which such change is claimed to have occurred.

(3) Evidence supporting contention that average base period net income does not reflect normal operations for the entire base period. New management and new product See schedule attached

(c) Did the business reach, by the end of the base period, the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, 2 years prior to the time the commencement or change occurred? No If answer is "no," furnish particulars See statements attached

(d) Was change in capacity for production or operation of business consummated during a taxable year ending after December 31, 1939, as a result of a course of action to which taxpayer was committed prior to January 1, 1940? Yes

(e) If answer to (d) is "yes". See statements attached

(1) State date upon which such change was consummated and extent to which income for such year reflects such change.

(2) Submit evidence of commitment to a course of action prior to January 1, 1940.

(3) Attach schedule showing net capital addition or net capital reduction (section 713 (g) (1) or (2)) and the amount of money or property expended after the beginning of the first excess profits tax taxable year under the Internal Revenue Code in changing the capacity for production or operation of the business.

☒ 5. Other factors producing an average base period net income which is an inadequate standard of normal earnings and which are not inconsistent with the principles and limitations of section 722 (b) (section 722 (b) (5)).

(a) Describe other factors claimed to affect business during the base period and to result in an average base period net income which is an inadequate standard of normal earnings. See statements attached

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SCHEDULE C—TAXPAYERS NOT ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer not entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below: See statements attached

☒ 1. The business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income (section 722 (c) (1)).

(a) Describe character of intangible assets.

(b) State names and addresses of other corporations believed to be in the same class of business where intangible assets of a similar character make important contributions to income.

☒ 2. The business of the taxpayer is of a class in which capital is not an important income-producing factor (section 722 (c) (2)).

(a) Describe nature of the business and explain why capital is not an important income-producing factor.

(b) State names and addresses of other corporations believed to be in the same class of business in which capital is not an important income-producing factor.

☐ 3. The invested capital of the taxpayer is abnormally low (section 722 (c) (3)).

(a) Describe circumstances causing invested capital to be abnorm

Part of Exhibit 2-B.

(p 53)

AFFIDAVIT

We, the undersigned officers of the corporation for which this application is made, being duly sworn, each for himself deposes and says that the statements made herein (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete statements of facts made in good faith pursuant to the requirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

[CORPORATE SEAL]

(Name) Treas. (Title)

(Name) Secretary (Title)

Subscribed and sworn to before me this 2 day of [illegible], 194[illegible]

(Signature of officer administering oath)

Notary Public

(Title)

U. S. GOVERNMENT PRINTING OFFICE 16 [illegible]

spent millions of dollars in advertising in building up its good-will, name and reputation as a leader in the farm and garden seed field. While this money over a period of time appears to have been partially well spent by being one of the leaders in the seed industry, the operating results had been disappointing up until the time of the change in policy and general management on or about the fall of 1938.

It will be interesting to note the experience of this taxpayer over a period of the last several years to see that in spite of large volume of business transacted, a substantial operating loss has been sustained and only until after the base period did the taxpayer through new methods and new products, reach a fraction of its potential operating profits:

Particulars	Profit or Loss Before Income Taxes
Deficit Accumulated to June 30, 1928	$ 94,339.28
Fiscal Year Ended June 30	
1929	2,403.97
1930	4,969.94
1932	20,865.33
1933	27,607.22
1934	4,704.80
1935	72,173.50
1936	1,165.82
1937	12,442.31
1938	21,832.35
1939	78,405.95
1940	19,017.38
1941	94,268.50
1942	134,734.91
1943	263,427.05

The operations of the business up to the time of the new management in the fall of 1938, and policies in force had resulted in a net operating deficit. These new policies could not be effected in the first year (fiscal year ended June 30, 1939) of the new management due to prior commitments. However, the effect of curtailment of advertising, new methods, discontinuance of the radio department and the [fol. 39] development and sale of the new hybrid seed corn products can be seen definitely after July 1, 1939. It follows therefore, that these improvements were not due to

economic conditions generally as a result of the world war, but to the effect of new methods and management, without the requirement of additional capital.

Advertising And Promotional Economies.

Following is a summary of the relation of advertising to total sales beginning with the base period and up to June 30, 1943;

Fiscal Year Ended June 30	Advertising			Net Sales	% to Net Sales	
	Catalogue	Other	Total		Including Radio Loss	Excluding Radio Loss
1937	$ 52,538.95	$114,953.17*	$167,492.12	$ 1,670,524.65	10.00%	8.03%
1938	79,264.60	174,801.85*	254,066.45	1,549,227.67	16.40	14.61
1939	87,427.92	49,961.05*	137,388.97	1,117,502.47	12.29	11.31
1940	40,904.31	32,826.33*	73,730.64	1,211,931.21	6.08	5.83
1941	72,502.26	36,555.89	109,068.15	1,462,631.15	7.46	7.46
1942	64,267.56	42,844.94	107,112.50	2,233,922.81	4.79	4.79
1943	57,088.63	42,999.07	100,087.70	2,923,742.53	3.42	3.42
Total	$453,994.23	$494,942.30	$948,936.53	$12,169,482.52	7.80	7.80
7 Year Average	$ 64,856.32	$ 70,706.04	$135,562.36	$ 1,738,497.50	7.80	7.80

* Includes radio department loss as follows:

1937	$33,023.00
1938	27,770.80
1939	11,016.87
1940	3,111.13
Total	$74,921.80

It will be noted from the foregoing that advertising costs were curtailed during the year 1939. The taxpayer believes that the non-recurring charges of excessive advertising and catalogue expenses should be excluded in reconstructing a normal operating result during the base period. The management is of the opinion that 5% is a fair standard of expense for advertising and catalogue expense. The experience from new management and new products in the years after 1939 is believed to justify the management's estimate of not more than 5% of net sales.

On the basis of 5% normal advertising costs, in relation to sales, it is proposed that normal tax deductions for such costs be reconstructed during the base years as follows:

[fol. 40]

Fiscal Year	Net Sales	Advertising Excluding Radio Loss	5% Proposal	Reduction Excluding Radio Loss
1937	$1,670,524.65	$134,469.12	$ 83,526.23	$ 50,942.89
1938	1,549,227.67	226,295.65	77,461.38	148,834.27
1939	1,117,502.47	126,372.10	55,875.12	70,496.98
1940	1,211,931.24	70,619.51	60,596.56	10,022.95
Totals	$5,549,186.03	$557,756.38	$277,459.29	$280,297.09

Hybrid Seed Corn.

The United States Department of Agriculture and various State Agricultural Schools have been experimenting with hybrid seed corn for over twenty years. However, this type of seed corn has not been produced in a commercial way except in the last ten years. The basis of hybrid corn is the combination of inbred lines. These inbred lines are established through many years of inbreeding of open-pollinated varieties, single crosses or double crosses. Once the characteristics of inbred lines have been thoroughly established by inbreeding, the inbreds must be combined to form single crosses, and these crosses crossed to produce double crosses. These double crosses produce the hybrid seed corn offered for sale to the farmer.

During the two or three years of development of hybrid seed corn, the taxpayer purchased high grades of hybrid seed corn and sold them to its customers until such time as it had developed a quality product. It will be interesting to observe at this point, the acceptance by corn growers of the new hybrid seed corn. We have obtained and submit below, a schedule setting forth the ratio of acres of hybrid seed corn to the acres of total corn planted in the the states of Iowa, Illinois, Missouri, and Nebraska.

Percent of Hybrid Corn Acres to Total Corn Acres

Year	Iowa	Illinois	Missouri	Nebraska
1937	30.7%	25.2%	.6%	2.5%
1938	51.9	47.5	1.8	6.8
1939	73.4	65.5	12.1	12.7
1940	90.3	76.4	26.9	24.9

1941	96.9	86.9	46.7	36.5
1942	98.9	93.3	60.1	51.4
1943	99.0	96.0	71.1	63.0
1944	99.8	96.9	80.7	74.8
1945	100.0	98.0	88.0	85.0

[fol. 41] The acceptance of hybrid corn by growers in the corn belt noted above, is not due to war conditions as these states are the major producers at any time.

The taxpayer began its development of hybrid corn before the close of the base period. Departmental records of sales and costs of sales from this new product were not provided until the fiscal year ended June 30, 1941. However, the following information has been developed:

Fiscal Year Ended June 30	Bushels Sold		Average Selling Price Per Bushel		Gross Sales	
	Purchased	Produced	Purchased	Produced	Purchased	Produced
1940	15,265	—				
1941	27,624	8,231	$5.55	$6.00	$163,313.20	$ 49,386.00
1942	33,261	33,084	6.00	6.55	199,566.00	216,567.00
1943	14,203	67,830	5.75	7.10	81,667.25	481,593.00

Bushels purchased and sold in 1938 and 1939 estimated at 5000 and 12000 respectively.

An analysis of the operating results of the hybrid seed corn department for the last two years is noted below:

Particulars	Fiscal Year Ended June 30	
	1942	1943
Net Sales	$396,063.72	$535,221.93
Cost of Goods Sold	277,039.71	343,546.98
Gross Profit	$119,024.01	$191,674.95
% to Net Sales	30.05%	35.81%
Expenses	57,497.90	89,754.05
Net Profit Before Income Taxes	$ 61,526.11	$101,920.90
% to Net Sales	15.53%	19.04%

Taxpayer here asserts that it has not yet reached its level of normal sales of hybrid seed corn, its most profit-

able line of seeds, and for the purpose of excess profits credit estimates its normal net income from this department alone will be not less than $125,000.00 annually. Executives estimate the normal sales of 100,000 bushels per annum to produce sales of $700,000.00 on which the net profit should aggregate approximately $130,000.00.

[fol. 42] Radio Station Operations.

Taxpayer prior to the close of the base period discontinued radio station KMA as an operating department, through commitments made prior to the close of business December 31, 1939 by the sale of the physical assets used by the radio station, to the organizers of a separate corporation. During the period from 1924 to April, 1940, taxpayer experienced considerable operating losses in developing the radio business. A part of these development and operating costs were reflected in the tax returns of the May Seed and Nursery Company during the base period which are set forth below for this purpose:

Fiscal Year Ended June 30	Operating Loss
1937	$33,023.00
1938	27,770.80
1939	11,016.87
1940	3,111.13
Total Exclusion from Base Years	$74,921.80

It is conclusive that these operating losses should be removed entirely in determining a fair standard of earnings for the May Seed and Nursery Company, because it is now a profitable enterprise. This position was accomplished through change in management and joining a National net-work of broadcasting stations. As a result of definite commitments entered into before the close of the base period, the May Broadcasting Company, successor to the KMA Broadcasting Station, has shown substantial profits since organization of that corporation.

Invested Capital Low.

With regard to the assertion that capital is not a material income-producing factor, it should be pointed out that the mail order business requires advanced payments

in most instances, and the stores operate for cash. Therefore, a large amount of capital is not required in the conduct of the taxpayer's business and the margin of profits are unusually large under normal conditions. However, as a matter of protection in this claim, development costs and good-will in the trade through extensive advertising programs over a period of years and fair treatment of the [fol. 43] customers should be considered. If required, the taxpayer can submit evidence of these intangible values as an addition to the rigid provisions of invested capital method, which basis is inadequate.

Summary.

Taxpayer has set forth previously the basis and fairness of reconstructing earnings within the spirit and meaning of Section 722 of the Internal Revenue Code for the base years. A showing has never been made of the base period operating results in Excess Profits Tax Returns filed for the fiscal years ended June 30, 1941, 1942 and 1943. Details of the operations, which have been prepared from tax returns of those years, are shown in Exhibit "A" attached hereto. A summary of these results is noted below, together with the amendments as a result of this claim:

Particulars	Fiscal Year Ended June 30 1937	1938	1939	1940	Total
Net Income or Loss Per Tax Return	$ 12,442.31	$ 21,832.35	$ 78,405.95	$ 19,017.38	$ 68,778.61
Amendments:					
Equipment Loss—Junked	4,597.14				4,597.14
Radio Dept. Loss	33,023.00	27,770.80	11,016.87	3,111.13	74,921.80
Non-Recurring Excess Adv.	50,942.89	148,834.27	70,496.98	10,022.95	280,297.09
Hybrid Seed Corn Normal Profits	125,000.00	125,000.00	125,000.00	125,000.00	500,000.00
Reconstructed Base Period Earnings	$226,005.34	$279,772.72	$128,107.90	$157,151.46	$791,037.42
Annual Average					$197,759.35
95% of Total as Excess Profits Credit					$187,871.38

Conclusion.

Taxpayer respectfully requests an oral conference with the representatives of your department at which time any additional evidence or information desired in connection with this claim will be made available by the taxpayer.

Respectfully submitted,

MAY SEED & NURSERY COMPANY

By E. S. Welch, Treas.

[fol. 44]

Exhibit "A".

Earl E. May Seed Company
Data on Base Period Earnings
Per Tax Returns Filed

	Year Ended June 30			
	1937	1938	1939	1940
Gross Sales	$1,703,061.28	$1,549,227.27	$1,129,157.38	$1,295,117.15*
Returns and Allowances	32,536.63	—	11,654.91	—
Net Sales	$1,670,524.65	$1,549,227.27	$1,117,502.47	$1,295,117.15
Cost of Sales:				
Inventory—Begin.	$ 94,188.77	$ 97,025.95	$ 105,921.04	$ 61,574.79
Purchases	1,139,452.01	1,028,877.08	772,530.20	827,358.62
Other Costs	—	—	—	—
	$1,233,640.78	$1,125,903.03	$ 878,451.24	$ 888,933.41
Inv.—Ending	97,025.95	105,921.04	61,574.79	42,149.97
Cost of Sales	$1,136,614.83	$1,019,981.99	$ 816,876.45	$ 846,783.44
Gross Profit	$ 533,909.82	$ 529,245.28	$ 300,626.02	$ 448,333.71
Ratio to Net Sales	31.96%	34.16%	26.90%	34.62%
Discounts Taken	$ 2,651.96	$ —	$ 906.27	$ 1,262.43
Rents	—	—	7,125.86	—
Commissions	—	—	3,736.13	—
Radio Time Sold	—	—	91,553.77	—
Auto Account Credit	—	—	783.22	3,907.07
Total Income	$ 536,561.78	$ 529,245.28	$ 404,731.27	$ 453,503.21
Deductions:				
Comp. of Officers	$ 17,000.00	$ 15,500.00	$ 14,850.00	$ 14,000.00
Rent	19,179.64	15,769.77	19,265.68	20,959.25

Repairs	14,623.94	4,669.63	4,725.56	5,240.06
Bad Debts	445.07	931.39	403.11	673.19
Interest Paid	3,532.97	4,007.88	2,367.54	2,089.02
Taxes Paid	9,698.87	14,673.54	14,597.51	16,511.17
Radio Transmitter Junked	4,597.14	—	—	—
Depreciation	17,506.43	21,651.87	21,599.23	12,150.73
Salaries & Wages	195,538.45	141,919.37	120,389.52	150,106.49
Freight & Cartage	1,970.64	1,938.95	1,399.03	—
Telephone & Telegraph	5,917.46	4,030.18	3,922.16	3,491.21
Printing, Postage & Parcel Post	12,291.18	11,598.56	9,173.97	12,941.97
Fuel, Light, Power & Water	16,072.91	19,700.95	13,656.51	13,282.57
Traveling Expense	751.67	894.41	709.31	235.13
Auto & Truck Expense	1,839.51	—	—	—
Advertising	114,953.17	174,801.85	38,944.18	29,715.20
Association Dues	357.50	250.00	346.75	183.50
Insurance	2,447.72	2,980.99	2,639.25	82.76
Store Exp. & General	17,997.14	20,930.38	7,020.60	6,811.27
Legal Expense	1,282.07	811.53	902.45	674.03
Material & Supplies	8,303.82	8,756.17	6,079.09	3,927.64
Shenandoah Store Exp.	1,222.87	—	194.76	—
Check Exchange	2,515.11	2,341.97	1,714.65	1,923.05
Jubilee Expense	670.71	1,569.18)	1,046.19	1,598.42
Flower Show Expense	678.08	283.57)	—	—
Premiums	186.45	1,485.70	—	—
Catalogue Expense	52,538.95	79,264.60	87,427.92	40,904.31
Trial Ground Expense	—	305.29	—	—
Discounts Allowed	—	9.90	—	—
General Expense	—	—	7,191.61	9,450.37
Radio Broadcasting Exp.	—	—	102,570.64	87,297.04
Storage Expense	—	—	—	237.45
Totals	$ 524,119.47	$ 551,077.63	$ 483,137.22	$ 434,485.83
Net Income Before Income Taxes or Excess Pro. Tax	* Includes Radio Department Sales of $83,185.91			
	$ 12,442.31	$ 21,832.35	$ 78,405.95	$ 19,017.38

[fol. 45] Affidavit.

State of Iowa,

County of Page—ss.:

I, E. S. Welch, Treasurer of Earl E. May Seed and Nursery Company and/or May Seed and Nursery Company of Shenandoah, Iowa, familiar with its affairs, on oath do depose and say that I have read the foregoing statements and be-

lieve them to be true and complete to the best of my knowledge and belief.

E. S. WELCH.

Subscribed to and sworn before me the 13 day of September, 1943.

BESS M. CAGLEY,
Notary in and for Page County, Iowa.

Affidavit of Agent.

I, John S. Oden, on oath do depose and say that I have prepared the attached protest from information furnished me by the taxpayer which I believe to be true and complete to the best of my knowledge and belief.

JOHN S. ODEN.

State of Iowa,
County of Polk—ss.:

Subscribed to and sworn before me the 11 day of September, 1943.

MARY ANN BACHMAN,
Notary in and for Polk County, Iowa.

Note

Pages 11, 13, 25, 35, 37, 51, and 53 are on Card 2;
All pages not present are blank.

[fol. 48] Exhibit "4-D".

October 26, 1948

600 Farm Credit Bldg.
AJK:ms

May Seed & Nursery Company
Shenandoah, Iowa

Gentlemen:

There is enclosed a copy of the report covering the examination of your application(s) for relief pursuant to the provisions of section 722 of the Internal Revenue Code. After careful consideration by this office it has been concluded that your constructive average base period net income should be as follows:

	Year ended	Constructive Average Base Period Net Income
(a)	June 30, 1941	None
	June 30, 1942	None
	June 30, 1943	None
	June 30, 1944	None
	June 30, 1945	None

(a) Carryover claimed per claim for year ended June 30, 1943.

these
If you agree to this determination(s), the enclosed form of Agreement should be executed and forwarded to this office promptly in order that review of the recommendation(s) by the excess profits Tax Council may be facilitated.

If you do not agree to the determination(s) proposed herein, you may file a protest, executed in triplicate under oath, with this office within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration. If you so request, an opportunity for a conference in this office will be granted you prior to the certification to the Excess Profits Tax Council of recommendations with respect to your applications for relief. This letter is not a final notice of determination under section 732 of the Internal Revenue Code.

Should no response to this letter be received within the 30-day period, the section 722 record will be transmitted to

the Excess Profits Tax Council for consideration, and you will be advised of the Council's determination(s) in due course.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be appreciated.

Very truly yours,

.....

Internal Revenue Agent in Charge.

Enclosures:
Receipt; Report; Form EPC-1

[fol. 49]

Exhibit "5-E".

Letter of Transmittal

Section 722 Report

Place Ottawa, Iowa

Date October 8, 1948

Examining officer J. W. France

Time Spent on examination 10-4-0

Internal Revenue Agent in Charge
600 Farm Credit Building
Omaha, Nebraska

In re May Seed and Nursery Company
Shenandoah, Iowa

Industry Seed and Nursery Stock and Broadcasting Station

Principal products Farm Seeds and Nursery Stock

Operations performed Retail and Wholesale and operating a broadcasting station

Applications for relief filed by the above-named corporation under the provisions of Section 722 of the Internal Revenue Code have been subjected to a field investigation

and after careful consideration the following recommendations are made:

	Year ended	Claim Number	Date claim filed	ABPNI Used on Return or Allowed*	CABPNI claimed	CABPNI allowed
(a)	6-30-41	20646	9-15-43	$20,615.63	$197,759.35	None
	6-30-42	20645	9-15-43	* 23,343.27	197,759.35	None
	6-30-43	20646	9-15-43	* 26,657.54	197,759.35	None
	6-30-44	34366	9-18-44	* 28,195.19	197,759.35	None
	6-30-44	38459	9-15-44	Duplicate		
	6-30-45	40153	9-17-45	* 32,121.92	197,759.35	None

* Where invested capital credit was used on return or allowed give amount and mark with asterisk.

(a) Carryover claimed per claim for year ended June 30, 1943

Date and State of incorporation: January 1, 1919, in Iowa

Case has been discussed with: Denver Busby and John Oden

Agreement (Not obtained, reason)

[fol. 50] Exhibit "6-F".

April 3, 1952

Form EPC-1
Treasury Department
Internal Revenue Service
(August 1946)

Excess Profits Tax Council

Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code

Application for relief pursuant to the provisions of Section 722 of the Internal Revenue Code, having been filed by the taxpayer and considered by the Commissioner, the taxpayer

May Seed & Nursery Co.
(Name)

of Shenandoah, Iowa
(Address)

for the purpose of computing the excess profits credit hereby consents and agrees to the determination of Constructive Average Base Period Net Income in accordance with the provisions of Section 722 of the Internal Revenue Code for the excess profits tax taxable years and in the respective amounts as follows:

Taxable year ended	Constructive Average Base Period Net Income
June 30, 1941 (for carryover purposes)	$58,200.00
June 30, 1942	$96,900.00
June 30, 1943	$96,900.00
June 30, 1944	$96,900.00
June 30, 1945	$96,900.00
June 30, 1946	$96,900.00

MAY SEED & NURSERY CO.
(Taxpayer)

Shenandoah, Iowa
(Address)

By Denver A. Busby,
(Title) Attorney-in-Fact.

Date Apr. 3, 1952.

[fol. 51] Exhibit "7-G".

EPC:JRB

Excess Profits Tax Council
Washington
Council Determination

Approved
Date Jun. 16, 1952
Robert W. Andrews
Coordinator

Taxpayer: May Seed and Nursery Company
Shenandoah, Iowa

Industry: Seed and Nursery

Principal Products: Farm seeds, nursery stock and Hybrid corn.

Operations performed: Seed and Hybrid corn production and retail and wholesale sales.

Year ended	Invested capital credit	Constructive Average Base Period Net Income: Claimed by taxpayer	Constructive Average Base Period Net Income: Certified by field	Constructive Average Base Period Net Income: Council Determination
6-30-42	$23,343.27*	$197,759.35	None	$96,900
6-30-43	26,657.54*	197,759.35	None	96,900
6-30-44	28,195.19*	197,759.35	None	96,900
6-30-45	32,121.92*	197,759.35	None	96,900
6-30-46	32,804.33*	197,759.35	None	96,900

*Credit based on invested capital

CABPNI determined for carry-over purposes.

Year ended	Invested capital credit	Constructive Average Base Period Net Income: Certified by Field	Constructive Average Base Period Net Income: Council Determination
6-30-41	$20,615.63*	None	$58,200

Second Field Certification dated: December 3, 1951

Agreement: Dated April 3, 1952

Bases of Taxpayer's applications and action thereon:

Section 722 Subsection	Qualifying Factor	Field Determination	Council Determination
(b)(1)	Not stated	Denied	Denied
(b)(2)	Not stated	Denied	Denied
(b)(3)(a)	Not developed	Denied	Denied
(b)(3)(b)	Not developed	Denied	Denied
(b)(4)	Change in operation	Allowed	Allowed
	Change in product	Allowed	Allowed
	Commitment	Denied[1]	Denied[1]
	Change in Management	Denied	Denied
(b)(5)	Not developed	Denied	Denied
(c)(1),(c)(2), (c)(3)	Not applicable	Denied	Denied

[fol. 52] Related Administrative Matter:

A valid claim Form 991, #20645 for the year ended June 30, 1942 has been filed claiming taxes paid for that year in the amount of $40,849.36.

[1] Commitment, discontinuance of a radio station. Since the radio station was actually disposed of prior to the end of the taxpayer's base period ending June 30, 1940, this factor has been recognized as an actual change in the character of the taxpayer's business.

A valid claim Form 991 #20646, has been filed for the year ended June 30, 1943 claiming taxes paid at the time of filing such claim in the amount of $32,282.89. A carry-over of unused excess profits credit from the years ended June 30, 1941 and 1942 is claimed in the computation of taxes for that year. Claim Form 843 #20646-A has been filed claiming additional excess profits taxes paid and assessed subsequent to the filing of the original Form 991.

A valid claim, Form 991 #34366 has been filed for the year ended June 30, 1944 claiming taxes paid at the time of filing such claim in the amount of $14,733.19. Claim Form 843 #36366-A has been filed to cover additional payments of taxes made subsequent to the filing of the original Form 991.

A valid claim, Form 991 #40153, has been filed for the year ended June 30, 1945 claiming taxes paid at the time of filing in the amount of $11,029.27.

Three subsequent claims, Form 843 #40153-A, 40153-B and 40153-C have been filed covering payments and assessments made subsequent to the filing of the original Form 991 in the amounts of $37,989.72, $33,087.82 and $7,750.73 respectively.

A claim, Form 991 #58211 has been filed for the year ended June 30, 1946 claiming taxes paid at the time of filing such claim in the amount of $49,722.95. According to the stamp on the face of the claim it was received in the mail room of the Bureau of Internal Revenue on December 19, 1949. It would appear that unless the year ended June 30, 1946 was still open by consent or other reason the claim was not timely filed.

A claim, Form 843 #58211-A was received July 28, 1949 by the Collector of Internal Revenue for the Iowa District according to the stamp on the face of the claim. The amount of refund claimed is $37,292.21.

[fol. 53] Exhibit "8-H".

EPC: ALW

Internal Revenue Agent in Charge
600 Farm Credit Building
19th & Douglas Streets
Omaha 2, Nebraska

In re: Section 722 claims filed by
May Seed & Nursery Company
Shenandoah, Iowa

There is transmitted herewith the decision of the Excess Profits Tax Council with respect to the taxpayer's application for relief under section 722, together with the related portion of the administrative file on the above-named corporation, for the taxable years ended June 30, 1941 through 1946 inclusive.

Your attention is invited to the fact that the decision of the Council relates to the determination of constructive average base period net income only, for the taxable years involved.

The case is returned to you for disposition in accordance with Commissioner's Mimeograph R. A. 1529, dated July 31, 1946.

ROBERT W. ANDREWS,
Coordinator, Excess Profits Tax Council.

Enclosures:

Claims Form 991

20645—1942
20646—1943
34366—1944
40153—1945
58211—1946

Claims Form 843

20646-A 1943
34366-A 1944
40153-A-B, & C—1945—58211-A—1946

Treasurer Internal Revenue, Washington, D. C.

EPC-1

[fol. 54] Exhibit "9-I".

U. S. Treasury Department
Office of Internal Revenue Agent in Charge
600 Farm Credit Bldg., 19th and Douglas Sts.
Omaha 2, Nebr.

June 25, 1952

Internal Revenue Service

In replying refer to: AJK:JA

May Seed & Nursery Company
Shenandoah, Iowa

Gentlemen:

Your application(s) for relief filed under the provisions of section 722 of the Internal Revenue Code for the taxable years,(s) ended 6-30-42, 6-30-43, 6-30-44, 6-30-45 and 6-30-46 has (have) been considered and a determination of constructive average base period net income pursuant to the provisions of such section has been made by the Excess Profits Tax Council.

As a consequence of the determination of constructive average base period net income under section 722, your income and excess profits tax liability for the years designated has been redetermined as set forth in detail in the attached statement.

Action in this connection will be suspended for a period of 15 days from the date of this letter, during which you may record your agreement to the deficiencies in tax or overassessments set forth in the attached statement by executing and returning to this office the enclosed form of agreement.

Upon receipt of the properly executed agreement or upon the expiration of the 15-day period, disposition of the case will be effected in accordance with section 272 and section 732 of the Internal Revenue Code.

Very truly yours,

.....

Enclosures Internal Revenue Agent in Charge.

[fol. 55]

May Seed & Nursery Company
Shenandcah, Iowa

Statement of Tax Liability
Reflecting the Decision of the Excess Profits Tax Council
with Respect to the Section 722 Issues

Year Ended	Kind of Tax	Liability	Assessed	Deficiency	Over-assessment
6-30-42	Income	$ 36,513.07	$ 26,782.89	$ 9,730.18	
6-30-42	D. V. Excess Profits	5,783.51	5,783.51	—	
6-30-42	Excess Profits	12,690.38	44,078.07		31,387.69
6-30-43	Income	38,822.00	9,051.84	29,770.16	
6-30-43	D. V. Excess Profits	11,470.52	11,470.52	—	
6-30-43	Excess Profits	149,285.10	134,864.31	14,420.79	
6-30-44	Income	39,850.39	11,489.16	28,361.23	
6-30-44	Excess Profits	23,055.54	57,077.57		34,022.03
6-30-45	Income	42,936.58	14,419.46	28,517.12	
6-30-45	Excess Profits	23,719.04	51,867.82		28,148.78
6-30-46	Income	62,350.03	49,487.07	12,862.96	
6-30-46	D. V. Excess Profits	1,472.46	1,472.46	—	
6-30-46	Excess Profits	51,236.75	76,103.22		24,866.47

The Excess Profits Tax Council has made a determination under section 722 of the Internal Revenue Code as follows:

Year Ended	Constructive Average Base Period Net Income
6-30-41 (for carry-over)	$58,200.00
6-30-42	96,900.00
6-30-43	96,900.00
6-30-44	96,900.00
6-30-45	96,900.00
6-30-46	96,900.00

Based on this determination the tax liability is computed as follows:

Year Ended June 30, 1941
Unused Excess Profits Credit

Net Income		$94,268.50
Less: D. V. Excess Profits Tax	$ 1,271.72	
Capital gain	56,193.90	57,465.62
Excess Profits Net Income		36,802.88
Excess Profits Credit (95% of $58,200.00)		55,290.00
Unused Excess Profits Credit		$18,487.12

Post War Credit
Adjusted 5/22/53.

[fol 56]

Year Ended June 30, 1942

Declared Value Excess Profits Tax

Net Income		$137,064.45
Less: Exemption		75,000.00
Balance subject to tax		62,064.45
Tax $37,500.00 at 6.6%	$2,475.00	
25,064.45 at 13.2%	3,308.51	
Declared Value Excess Profits Tax	$5,783.51	

Income Tax

Net Income		$137,064.45
Less: D. V. Excess Profits Tax	5,783.51	
Excess Profits Tax	12,690.38	18,473.89
Net income for normal tax & surtax		118,590.56
Normal tax $118,590.56 24%	28,461.73	
Surtax 25,000.00 6%	1,500.00	
93,590.56 7%	6,551.34	
Total income tax	$36,513.07	

Excess Profits Tax

Excess Profits Net Income per RAR		$133,499.41
Less: 50% of interest		2,218.47
Excess Profits Net Income as revised		131,280.94
Less: Specific exemption	5,000.00	
Excess Profits Credit (95% of $96,900.00)	92,055.00	97,055.00
Adjusted Excess Profits Net Income		34,225.94
Tax 20,000.00 35%	7,000.00	
14,225.94 40%	5,690.38	
Excess Profits Tax	$12,690.38	

Note: The unused excess profits credit of the year ended June 30, 1941, was claimed as an excess profits credit carry-over to the year ended June 30, 1943. Since it was not claimed for the year ended June 30, 1942, it cannot be allowed for that year. However, it must nevertheless be applied against the net income of the year [fol. 57] ended June 30, 1942, for the purpose of determining the amount which may be carried over to the year ended June 30, 1943. Therefore, there is no carry-over which may be used in the year ended June 30, 1943. The computation is as follows:

Excess Profits Net Income 6-30-42		$131,280.94
Less: Excess Profits Credit	92,055.00	
Excess Profits Credit carry-over	18,487.12	110,542.12
Unused Excess Profits Credit		None

Year Ended June 30, 1943
Declared Value Excess Profits Tax

Net Income		$274,397.85
Less: Exemption		150,000.00
Balance subject to tax		124,397.85
Tax $75,000.00 at 6%	$ 4,950.00	
49,397.85 at 13.2%	6,520.52	
Declared Value Excess Profits Tax	$11,470.52	

Income Tax

Net Income		$274,397.85
Less: D. V. Excess Profits Tax	11,470.52	
Income subject to Excess Profits Tax	165,872.33	177,342.85
Net Income for normal tax & surtax		97,055.00
Normal tax $97,055.00 24%	23,293.20	
Surtax 97,055.00 16%	15,528.80	
Total Income Tax	$38,822.00	

Excess Profits Tax

Excess Profits Net Income per RAR		$265,241.76
Less: 50% of interest		2,314.43
Excess Profits Net Income as revised		262,927.33
Less: Specific exemption	5,000.00	
Excess Profits Credit	92,055.00	97,055.00
Adjusted Excess Profits Net Income		$165,872.33
Tax $165,872.33 90%	$149,285.10	
Post War Refund Credit	$ 14,928.51	

[fol. 59] (Transcript of Proceedings)

(Filed December 23, 1954, The Tax Court of the United States)

In The Tax Court of The United States

May Seed and Nursery Company, Petitioner,
Docket No. 50073. vs.
Commissioner of Internal Revenue, Respondent.

United States Court Room
1212 Lake Shore Drive
Chicago, Illinois,
Monday, November 29, 1954.

5—15,518

The above entitled matter came on for hearing, pursuant to notice to the parties, at 2:20 o'clock, p.m.

Before:

Honorable Arnold Raum, J., Presiding.

Appearances:

Denver A. Busby, Esq., Chicago, Illinois, appearing for the Petitioner.

Julian L. Berman, Esq., (Hon. Daniel A. Taylor, Chief Counsel, Internal Revenue Service), for the Respondent.

[fol. 61] Proceedings.

The Clerk: Docket No. 50073, May Seed and Nursery Company.

Will counsel please state their appearances for the record?

Mr. Busby: Denver A. Busby for the petitioner.

Mr. Berman: Julian L. Berman for the respondent.

Mr. Busby: Your Honor please, this case, the issue is clear and precise, but I believe counsel for the respondent said this morning something about a simple case. I think the issue goes to very basic principles of tax administration.

It originally arose out of a Section 722 case. That issue however, was settled by the agreement between counsel and the Excess Profits tax counsel in April of 1952. So that there are no issues pertaining to Section 722.

There will be submitted in this record, a copy of the letter addressed to me as counsel from Mr. Hoffman, member of the Excess Profits Tax Counsel in which he stated that the function of the Excess Profits Tax Counsel is limited to the determination of constructive average net base period income. Computations of the tax consequences of the tax determination is in this case within the office of the Internal Revenue Agent.

If Your Honor please, that is the position exactly of the petitioner here. When an agreement was reached, not only

as to the taxable year involved here which is 1942, but in the other years, also there was a determination made by the [fol. 62] counsel of a constructive average base period net income or credit for the year June 30, 1941, specifically stated for carry-over purposes.

Now, when that agreement was reached, it is our position that Section 722 is no longer in issue, and therefore, we must look to the Code, to the regular sections pertaining to the determination of a tax liability based upon a constructive average base period net income.

That is found, insofar as the issue here, which is this. 1941 there was, and it is stipulated, an unused Excess Profits Tax credit of some $18,000. Petitioner claims that he is entitled to that for 1942.

The Court: That is based upon the constructive average base period net income?

Mr. Busby: That is correct. It has been stipulated that on that basis there is an unused Excess Profits Tax credit for 1941. Petitioner says it is entitled to that for 1942 for two reasons.

First, as was determined by this Court in the Treacher case, Section 710 makes a carry-over of an unused Excess Profits credit mandatory. Reason number one.

Reason number two is that Section 722 provides that under certain circumstances, a taxpayer may file a claim for relief. It must be filed in accordance with regulations promulgated by the Commissioner.

[fol. 63] The claims for the years 1941, '42 and '43, were filed on the same day, September 15, 1943. At that time there were no provisions whatsoever in the Commissioner's regulations, on the form or anywhere else requiring that if there was an unused Excess Profits Tax carry-over for any year that it must be specifically claimed in any one of the years.

However, the claims for '42 and '43 were filed, as I say on the same day, and if the claim had been substantially allowed, there was no reason for the taxpayer to make a

claim for an unused Excess Profits Tax credit for 1942 because its claim on 991 was in excess of the Excess Profits Tax net income.

It did, however, claim an unused credit from '41 to be carried over into 1943, and attached to the 991, a computation of the amount that it claimed.

The Court: From 1941 to '43.

Mr. Busby: That is right. In the claim for 1943, there was sufficient Excess Profits Tax net income over and above the constructive average claimed by the taxpayer so that it would be of some consequence to take this unused Excess Profits Tax credit from '41 and claim it in '43.

Now, in July of 1944, the regulations of the Commissioner were amended to add a provision that if you wanted a carry-over in any specific year for which you filed a 991, if you wanted a carry-over from some previous year or some succeeding year, that you should—using the word should—you [fol. 64] should specifically claim it in the year to which you wanted the unused credit applied.

Now that was ten months after these claims were filed, and I have and will state in the briefs, many cases in all the courts clear up to the Supreme Court, in which a regulation such as that cannot be made retroactive and given retroactive application.

The regulations provide, and have from the inception of Section 722, that the claims must be filed in accordance with the regulations.

The Court: Let me get clear from you just what the issue is between you and the government. Am I correct in understanding that you have an unused carry-over from '41, or an unused credit from '41 that you wish to carry over to '42, and the government is disallowing the carry-over because you have not filed an appropriate claim for carry-over? Is that the issue?

Mr. Busby: They are disallowing it on the ground that the claim as filed in 1943 was not in accordance with some regulations that they first issued in July of 1944. That is specifically it.

The Court: But dealing with the claim for the carry-over.

Mr. Busby: That is right. They admit if the petitioner is correct, there is an $18,000 credit that should be applied and reduce the tax in 1942 to the sum of approximately [fol. 65] five thousand dollars. However, they say you did not, when you filed those claims in 1943, you did not do as we tell you to do in July of 1944.

Now, it is the petitioner's position that you cannot make a regulation such as that retroactive.

The filing as referred to is a specific statutory act. When certain things are done, the forms are properly filled out. They are properly signed and sworn to, and delivered in the hands of the Collector or Commissioner, or whoever it may be, that is an act of filing. And if that is done in accordance with the law and regulations at that time, you cannot come along later and say you did not file it in accordance with regulations of the Commissioner.

The 722 issue having been disposed of, having been agreed that there is an unused credit here, [than] it is the position of the petitioner that the other sections of the Code, specifically Section 710 comes into play and it says specifically if there is an unused Excess Profits Tax credit for any year, it shall be unused credit for the next two succeeding years. And in the Treacher case this Court held it was mandatory.

In that case the taxpayer found it to his advantage, due to peculiar circumstances, the 80 per cent limitation. It would liked to have had a higher excess profits tax because it would get ten per cent as opposed to our credit, but the Court said no, you cannot do that. It is mandatory.

[fol. 66] Now in this particular case the respondent has said, well, now, we can't allow it in 1943 either even though you specifically claimed it in '43, and attached a computation in '43. We can't allow it to you because a part of Section 710 says that if there is an intervening year you must first exhaust that against the tax of the intervening year, therefore, there is nothing we can give you in '43.

Basically and according to the law they were correct. They cannot give it in '43, but that same section of the law

says it is mandatory and therefore you cannot take part of a section and say that that stops the taxpayer and then ignore the rest of the section.

That is our position, Your Honor.

The Court: It seems to me, if my recollection is accurate, that we have had several cases dealing with this problem, and I seem to recall an opinion by Judge Opper and another one by Judge Black, in one of them the carry-over was allowed and the other one denied upon the nature of the claim that was filed. Perhaps you can find them and discuss them on brief.

Mr. Busby: Yes, I feel certain that all of the cases holding that the carry-over cannot be allowed can be easily distinguished and principally on this ground; that the original claim for the year to which petitioner asked to have the [fol. 67] credit, they were filed after this regulation was amended, and in one particular case where this Court denied it, they denied it on the ground that there had never been a finding by the Excess Profits Tax Counsel that there was an unused credit. That is the Lockhardt Creamery case. But I know of no case, Your Honor, involving this carry-over of unused credit in which the claims were filed prior to the amendment of this regulation.

The Court: Of course, the requirement of a claim is the statutory requirement rather than a requirement by regulation.

Mr. Busby: However, there is no provision, Your Honor, in Section 722 anywhere with reference to carry-over. There is nothing in there as to how you shall compute the tax. The only thing that there is that gives the government a thread to hold on, is that the statute says right at the outset, that a taxpayer must file a claim on proper forms and so forth, and in accordance with the regulations promulgated by the Commission. That is the only way that this alleged regulation could effect this case at all. And it is our position that the Commissioner had no authority to put anything in there which was contrary to the specific provisions of Section 710. Section 710 is clear and unambiguous, and it says that it is mandatory and the court so found in this Treacher case.

Now, that is one. The next one is that the Commissioner is without authority, and I know of no court which has sus- [fol. 68] tained the Commissioner in giving retroactive application to a regulation such as this where there is a specific statutory requirement that a thing shall be filed so and so in accordance to regulations. If it is done that act is over.

Mr. Berman: If the Court please, may I introduce on behalf of the parties, a [situlations] of facts with exhibits attached thereto.

The Court: The stipulation and accompanying exhibits will be received.

(The stipulation and accompanying exhibits were received in evidence.)

Mr. Berman: Your Honor, in the stipulation of facts, two exhibits are not attached to the stipulation of facts. However, these exhibits are designated as exhibits in the stipulation of facts, and they are attached to the petition and it is clearly set forth in the stipulation of facts, such as the notice of disallowance is Exhibit A attached to the petition, designated Exhibit 1-A in the stipulation of facts.

We also have two joint exhibits, Your Honor, to introduce. One is a letter dated July 2, 1952 from the Internal Revenue Agent in charge at Omaha, Nebraska, to Mr. John S. Odin in this case. We would like to introduce that as Joint Exhibit 10, Judge. Joint Exhibit 10 J.

The Court: It will be received.

[fol. 69] (Joint Exhibit 10J was marked for identification and received in evidence.

Mr. Berman: And another letter, Your Honor, from Mr. Earl A. Hoffman, member of the Excess Profits Tax Counsel, dated July 9, 1952, to Mr. Busby. I would like to introduce that as Joint Exhibit 11 K.

The Court: Admitted.

Joint Exhibit 11 K, was marked for identification and received in evidence.)

Mr. Berman: Now if I may, Your Honor, say a few things with regard to the respondent's case. If it please the Court, the Court is correct that there are several cases that have been decided on this issue. The first one was a case by Judge Opper, the Packer Publishing case, where the carry-over credit was allowed because the taxpayer had attached to his claim a schedule showing the unused Excess Profits Tax credit carry-over.

The second case was the case of Judge Black, the Lockhardt Creamery case where the unused credit, Excess Profits Tax credit carry-over was denied because the petitioner had failed to claim it. And in that case Judge Black stated that unfortunately the petitioner claimed too high a constructive average base period net income in his claim, and [fol. 70] therefore, there was no reason to claim an unused Excess Profits Tax carry-over, and if perhaps the petitioner had been more realistic he would have claimed the benefits of an unused Excess Profits Tax credit carry-over. And in that case it was denied.

The Court: In your view must a claim be filed a year from which the carry-over stems or must it be filed with respect to the year to which a carry-over is derived?

Mr. Berman: The claim must be filed with respect to the year to which the carry-over is to be brought. That is, in this case the carry-over is a carry-over credit claimed from 1941 to 1942, and therefore, the claim that should have claimed the unused Excess Profits Tax credit carry-over should have been the 1942 claim.

The Court: If for any reason the taxpayer were not seeking Section 722 relief, for 1942, he would nevertheless under your view of the case have to file an application for 722 relief by reason of the carry-over from '41?

Mr. Berman: Well, the fact he is asking for the carry-over to be applied to '42 on the basis of Section 722, he is seeking Section 722 relief because Section 722 A requires that if a constructive average base period net income is determined, that the tax liability is computed in accordance with that constructive average base period net income, and the filing should be made for that year.

Now, if he has no liability for let us say 1941, and he de- [fol. 71] sires to have a constructive average base period net income from 1941 to 1942, he would not have to file a claim for refund for the year 1941, but he would have to with respect to the year 1942.

The Treacher case which was discussed by petitioner's counsel, Your Honor, is a case which has been considered by the court in the Barry Weymiller case, where the identical argument was raised by petitioner, that being alleged standard issue that the court must find that the petitioner is entitled to the unused carry-over credit.

However Judge Turner adequately distinguished the Treacher case. In the Lockhardt Creamery case, Your Honor, the petitioner's briefs clearly point out to the court that the situation was identical with the situation claimed by this taxpayer. That is that the claim was filed on or before the 16th of September, 1943. Subsequent to that date the statute was amended, and it allowed the filing of claims under 722 to be the same as all claims under Section 722 of the Internal Revenue Code of 1939, thereby opening the statute for the filing of claims for the normal period on standard issues.

Your Honor is familiar I am sure with the Hardaway Motor case. There the Excess Profits Tax Counsel determined, set out the function of the Excess Profits Tax Counsel is only to determine what the constructive average base [fol. 72] period net income is, and in this stipulation of facts, Your Honor, you will find the transmittal to the Revenue Agent in charge, Excess Profits Tax Counsel showing that the function of the counsel and its determination relates only to the constructive average base period net income. The fact that a constructive average base period net income was determined for the year 1941 for carry-over purposes, is not binding on the respondent at all. In fact, throughout this entire proceeding, Your Honor, the stipulation will show that at all times the government made it quite clear that the only carry-over credit that was being claimed was a carry-over credit to the year 1943.

The Court: Do I correctly understand there was no claim for carry-over from '41 to '42 filed either with respect to '41 or with respect to '42?

Mr. Berman: That is correct, Your Honor. Insofar as the matter affects the tax liability of the year 1942, which is the only year before this Court. Now, perhaps I did not understand your statement, Your Honor.

The Court: There were applications here for 722 relief filed with respect to the years 1941, 1942 and 1943. My question is whether or not in connection with either the claims to '41 or '42, there was a claim for carry-over from '41 to '42.

Mr. Berman: There was not, Your Honor.

The Court: There was not?

[fol. 73] Mr. Berman: No. I think that is all I have to say.

Mr. Busby: As to counsel's remarks and the question you asked Your Honor, I would like to say just a couple more words. You asked with reference, if it had not been for Section 722 what their position would have been. I would like to clear my thinking, at least, and I hope it helps you just a little bit.

If the Section 722 relief was not involved in the case anywhere, but there was a determination made by the—we will say the Commissioner's office sent the Revenue Agent in and he readjusted the income for '41, '42 and '43 on standard issues and some description. That I am sure counsel will agree with me that there would be no question whatsoever that Section 710 would apply, and if there was an excess credit for 1941, it would be automatically applied to '42 to the extent necessary and then any of the remainder would be applied to '43.

Now that is the position of this petitioner, and I am very glad he put in that letter from Mr. Hoffman because that certainly explains our position perfectly. The Excess Profits Tax Counsel's job is done when the counsel determines that there is a constructive average base period net income and how much it is. Thereafter, every provision of a regular code as to how they will collect the tax, procedure to go to Tax Court and what not, except as for instance not [fol. 74] reviewable by anybody—that is if there is a

722 issue which there is not here. It is gone. Now then, the regular provisions of the statute apply. That is it.

The Court: How do you explain the Lockhardt case?

Mr. Busby: The Lockhardt case I believe, I don't have that before me, but I know one of the reason why it was denied was that there had been no finding that there was an unused credit from some earlier year. That was one of them.

The published decision did not show when the claims were filed with reference to whether it was before the amendment of this regulation or after the amendment of the regulation. I know in all of the other cases I have looked at—

The Court: But it was treated as a 722 issue, the Lockhardt case.

Mr. Busby: I believe it was.

The Court: And it was reviewed by the Special Division.

Mr. Busby: That is right, Your Honor, but the published record does not show whether the claim on 991 was filed before or after this amendment which first put in that provision that if you wanted a carry-over, you should so state in the claim for the year to which you wanted the unused credit carried.

That came into being in 1944. I do not know whether Lockhardt filed their 991 for the year in question before or after July of 1944. In our case I know that it was filed in [fol. 75] 1943, September 15. Both '42 and '43 were sent to the Commissioner of Internal Revenue with the same transmittal letter, and as the exhibit attached to the stipulation will show, that if the amount of relief claimed by the taxpayer had been substantially allowed, there would be no liability, therefore, it would be a useless act to claim something else.

Further, I think it would have shown as he points out one of the members of this court remarked, had they filed a more reasonable claim maybe then they would have

known that they would need the carry-over. It seems to me that when the taxpayer filed its claim and then also claimed perfectly useless, meaningless carry-over, that that would be a passive admission that he did not think he could support his claim and that it was probably excessive.

I think it is going quite far to say that because a taxpayer files a claim, we will say for $50,000 constructive base period net income and ten years later finally in the compromise after a battle of ten years accepts $30,000, I say that is no proof whatsoever that his original claim was excessive. Many taxpayers have quit in disgust and have just been worn down to a frazel and quit. So I say that that is an assumption that is unwarranted.

The Court: I appreciate your point. I have really been wondering to what extent the authorities have been against you on this.

Mr. Busby: Well, Your Honor, I don't know. I have great respect for the Tax Court, very highest regard, but Bill Clems said he never made a mistake and yet I think a lot of ball players would say that maybe Bill missed one once in a while. So I hope in the brief you get from me I will be able to point this thing up. And I don't know that there has been any mistake made.

The Court: I assure you I will read it very carefully.

Mr. Busby: If Your Honor please, I would like on the briefs to file a brief and a reply brief, because I do not know what position the government may take on this case. I have had two conferees that agreed and recommended settlement of this case as we claimed it should be, only to find when it got into some other section and back it came and here we are.

Mr. Berman: Your Honor, I object to talk about settlement. I think it is highly improper. It has no bearing on the case before the court now.

The Court: When a case is fully stipulated, I generally leave it up to the parties to determine whether they want to file simultaneously or consecutive briefs, and since at

least one of the parties prefers consecutive briefs, I will permit that here.

Mr. Berman: The petitioner's counsel would just like a chance to reply to mine. I answer yours and you answer mine, would that be objectionable?

[fol. 77] Mr. Busby: When I file a brief you have a chance to answer. You answer my brief. Then as I say, if anyone got the impression that I did not think counsel would follow through here in his regular duties, which he should in regard to revenue, but it just so happens that these cases get into different departments, and different hands, and I do not know what they are going to argue in view of the circumstances. Therefore, I would like to file a brief, let them make an answer to my brief, and file a reply brief.

The Court: I will permit it. I will permit seriatim briefs.

Mr. Berman: May I say one thing, Your Honor?

The Court: It does not preclude any party at any time from filing with the Court, with a motion perhaps; any supplementary brief even beyond that.

Mr. Busby: Perfectly willing to file as many briefs as they want to, Your Honor, but I just would like an opportunity after they do file one to see if I can do anything to straighten it out.

The Court: The issues, or this issue is not a complicated one. It may be diffcult but it is not complicated.

Mr. Busby: That is right, Your Honor. It is clear cut, specific. I think there are some basic principles involved here that will require a little study.

The Court: Are you resting now?

Mr. Busby: Yes.

Mr. Berman: The only thing I would like to say, Your [fol. 78] Honor. If perhaps there is a mistaken belief by the Court that a claim for 991 was filed for the year 1941, perhaps from the questioning of me, there was none Your

Honor, that respondent knows of. We have absolutely no record of a claim for the year 1941 having been filed.

The Court: No claim of any kind for '41?

Mr. Berman: That is right, Your Honor. One of the exhibits shows a credit carry-over for 1941 claimed. I believe Joint Exhibit 5B, but as Your Honor will note that the claim number for '41 is identical for the claim number for 1943, and that is bacause in the '43 claim mention was made and request was made for a carry-over from '41 to '43. But there was no claim for '41 as such.

The Court: Do both counsel agree to that?

Mr. Busby: With this exception. I don't know. The only thing is that this exhibit attached here shows that there was a claim filed for 1941, although it is given the same claim number as the '43 claim.

The Court: Let me ask counsel, would counsel agree that as far as the record before me is concerned, there is no claim that has been filed for 1941.

Mr Berman: Yes, sir.

Mr. Busby: For this reason, Your Honor, that you could not file a claim and if one was filed, which I think may have happened, you could not file a claim for '41 because [fol. 79] there was no Excess Profits Tax liability, and I think that there was one filed and returned, but I am not sure.

The Court: As far as this record is concerned, I want to ask you again so we may be very clear. There is nothing in this record that shows that a claim was filed for '41.

Mr. Busby: Other than that reference to that one exhibit. That is all.

Mr. Berman: That is correct, Your Honor. As far as the record before you there is no claim for the year 1941.

Mr. Busby: Now as to the dates of the briefs?

The Court: Does the government rest?

Mr. Berman: The government rests, Your Honor.

The Court: Opening brief in 45 days; reply brief 30 days thereafter, and petitioner may answer 20 days after the government's brief is due.

The Clerk: Those dates are January 13, February 14, and March 3, 1955.

(Whereupon, at 2:55, o'clock, p. m., the hearing in the above-entitled matter was closed.)

[fol. 80] (Findings of Fact and Opinion of The Tax Court of the United States).

24 T. C. No. 126
The Tax Court Of The United States

May Seed And Nursery Company, Petitioner, vs. Commissioner Of Internal Revenue, Respondent.

Docket No. 50073. Filed September 29, 1955.

In 1943 petitioner filed an application for relief under Section 722 of the Internal Revenue Code of 1939 in respect of its fiscal year 1942, in which it did not claim a carry-over of an unused excess profits credit from its fiscal year 1941 based on a constructive average base period net income. Held, petitioner's right to the carry-over is conditioned upon the making of such claim. Lockhart Creamery, 17 T. C. 1123, followed.

Denver A. Busby, C. P. A., for the petitioner.

Julian L. Berman, Esq., for the respondent.

[fol. 81] The respondent, in respect of the fiscal year of the petitioner ended June 30, 1942, determined a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69. In making the determination respondent refused to allow an unused excess profits credit carry-over based on a constructive average base period net income from the fiscal year 1941 in the amount of $18,487.12. As a result of such disallowance, the overassessment of excess profits taxes determined by the respondent was $7,181.79 less than the

amount claimed by the petitioner, and petitioner's income tax liability was reduced in the amount of $2,226.35. The net amount in controversy is thus $4,955.44. The sole issue for determination is whether respondent erred in refusing to allow petitioner the benefit of the unused excess profits credit carry-over from its fiscal year 1941 to its fiscal year 1942, based on petitioner's constructive average base period net income.

Findings Of Fact.

A stipulation of facts filed by the parties is hereby incorporated by this reference as a part of our findings.

Petitioner is a corporation organized January 1, 1919, under the laws of the State of Iowa. It has its principal office at Shenandoah, Iowa, where it is engaged in the farm seed and supply business. Its return for the fiscal year ended June 30, 1942, was filed with the collector of internal revenue for the district of Iowa, at Des Moines, Iowa.

[fol. 82] Petitioner filed a tentative excess profits tax return for its fiscal year 1942 on September 15, 1942, having previously been granted an extension of time to file its excess profits tax return for that year until October 15, 1942. The excess profits tax return for the fiscal year 1942 was then filed on October 15, 1942. By duly executed consents, the period within which the respondent could assess any deficiencies in income tax, excess profits tax, or war profits tax was extended until June 30, 1947.

On September 15, 1943, petitioner filed on Forms 991 applications for relief under Section 722 of the Internal Revenue Code of 1939 in respect of its fiscal years 1942 and 1943. In the application in respect of its fiscal year 1942, petitioner claimed a constructive average base period net income of $187,871.38. This amount exceeded petitioner's excess profits tax net income for that year, and it did not claim the benefit of an unused excess profits credit carry-over for that year based on a constructive average base period net income from its fiscal year 1941. However, in its application in respect of the fiscal year 1943 it did claim such carry-over.

From September 15, 1943, to the end of 1951, numerous examinations were made of petitioner's books and records and a number of conferences held. During that period no constructive average base period net income was allowed, and no request was made that petitioner furnish a [fol. 83] computation of any unused excess profits credit for its fiscal year 1941. On April 3, 1952, petitioner agreed to a constructive average base period net income as determined by the Excess Profits Tax Council. The constructive average base period net income so determined was approved by the Co-ordinator, Excess Profits Tax Council, on June 16, 1952, and was as follows:

Fiscal Year Ended	Amount of Constructive Average Base Period Net Income
June 30, 1941 (for carry-over purposes)	$68,200.00
June 30, 1942	96,900.00
June 30, 1943	96,900.00
June 30, 1944	96,900.00
June 30, 1945	96,900.00
June 30, 1946	96,900.00

The respondent determined, for the fiscal year ending June 30, 1942, a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69, resulting from the partial allowance of the claim for relief under Section 722 of the Internal Revenue Code of 1939. In determining the overassessment in excess profits tax for the fiscal year 1942 respondent did not allow to the petitioner the benefit of an unused excess profits credit carry-over from its fiscal year 1941 based on a constructive average base period net income. Respondent gave as his reason the fact that no claim therefor had been made as required by the regulations in the application filed by petitioner with respect to its fiscal year 1942. It is this refusal on the part of the respondent which petitioner challenges and which raises the issues to be hereinafter met.

[fol. 84] Opinion.

Raum, Judge: Petitioner seeks the benefit of an unused excess profits credit carry-over based on a construc

tive average base period net income from its fiscal year 1942, notwithstanding that it made no claim for such carry-over in its application for relief which it filed with respect to 1942. This issue is foreclosed by the decision of this Court in Lockhart Creamery, 17 T. C. 1123, 1140-1143. Cf. St. Louis Amusement Co., 22 T. C. 522; Barry-Wehmiller Machinery Co., 20 T. C. 705.

Reviewed by the Special Division.

Decision will be entered for the respondent.

[fol. 85] (Order of Redetermination, October 28, 1955).

The Tax Court Of The United States

Washington

May Seed And Nursery Company, Petitioner,
Docket No. 50073 vs.
Commisioner Of Internal Revenue, Respondent.

Decision.

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed September 29, 1955, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year ended June 30, 1942, in the amount of $9,730.18.

Entered Oct 28 1955

Enter:

Seal
The Tax
Court Of The
United States

ARNOLD RAUM
Judge.

[fol. 86] Order Amending Decision

The Tax Court Of The United States

Washington

May Seed And Nursery Company, Petitioner,
Docket No. 50073 vs.
Commisioner Of Internal Revenue, Respondent.

Upon consideration of the joint motion filed by the parties on January 16, 1956, accompanied by a stipulation of the parties, it is

Ordered. That the decision heretofore entered in this proceeding on October 28, 1955, be and the same is hereby amended to include the following: "That there is an over-payment in excess profits tax for the taxable year ended June 30, 1942, attributable to an allowance under the provisions of Section 722 of the Internal Revenue Code of 1939, in the amount of $31,387.69, all of which was paid within two years before the filing of the claim for refund."

Seal
Court Of The
United States

ARNOLD RAUM
Judge.

Dated: Washington, D. C.
January 16, 1956.

[fol. 87] (Petition of May Seed and Nursery Company for Review of Decision of The Tax Court of the United States).

(Received and Filed November 30, 1955, The Tax Court of the United States).

In The United States Court Of Appeals
For The Eighth Circuit.

May Seed And Nursery Company, Petitioner,
vs.
Commissioner Of Internal Revenue, Respondent.

May Seed And Nursery Company files this, its Petition for Review from the Opinion of the Tax Court of the United States in the case of May Seed and Nursery Company, Petitioner vs. Commissioner of Internal Revenue, Respondent, Docket No. 50,073, made and entered on the 29th day of September, 1955 and from the decision of the Tax Court of the United States made and entered in said cause on the 28th day of October, 1955, and states:

Par. 1. That the tax return in this case was filed with the Collector (now Director) of Internal Revenue for the State of Iowa, at Des Moines, Iowa.

Par. 2. This case arose from the refusal of the Respondent, in his computation of tax for the fiscal year ended June 30, 1942, to allow an unused excess profits tax [fol. 88] credit carry-over from the fiscal year 1941 in the amount of $18,487.12.

Par. 3. As a result of this failure and refusal of the Respondent, the refund of excess profits tax made was $7,181.79 less than Petitioner claims it should have been, with statutory consequence that the income tax liability of the Petitioner was understated in the amount of $2,226.35. The net amount in controversy is, therefore, $4,955.44.

Par. 4. The points relied upon by Petitioner are that the allowance of an unused excess profits credit carry-over from the fiscal year 1942 is mandatory under Section 710 (c) (3) (4) of the Internal Revenue Code, and

Par. 5. If the allowance of an unused excess profits credit carry-over is not mandatory under the provisions of the Internal Revenue Code, Respondent does not have the authority to enforce retroactive application of an administrative regulation purporting to be issued under Section 722 of the Code, which enforcement, indirectly, would invalidate the statutory provisions of Section 710 (c), which is unambiguous and which makes no provision for administrative interpretation.

ROBT. J. BANNISTER
JAMES E. COONEY
E. B. CARPENTER
Attorneys for Petitioner.

[fol. 89] (Notice of filing of Petition for Review and Acknowledgment of Service).

(Filed December 1, 1955, The Tax Court of the United States).

To: John Potts Barnes,
Chief Counsel,
Internal Revenue Service.

You are hereby notified that the above-named petitioner did, on the 30th day of November, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Eighth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 1st day of December, 1955.

HOWARD P. LOCKE,
Clerk, The Tax Court of the United States.

Service of copy of Petition for Review acknowledged this 1st day of December, 1955.

JOHN POTTS BARNES
CAR
Chief Counsel.

Internal Revenue, Service, Attorney for Respondent.

[fol. 90] (Amendment to Petition of May Seed and Nursery Company for Review of Decision of The Tax Court of the United States).

(Received and Filed January 5, 1956, The Tax Court of the United States).

Comes now the May Seed And Nursery Company and amends its Petition for Review filed herein and states:

It strikes out from the fourth line of Paragraph Four thereof, the figure "(4)" and substitutes in lieu thereof the letter "(B)", and by adding at the end of the paragraph, after the word "Code" in the fifth line thereof, the words "of 1939", making such paragraph read as follows:

"Par. 4. The points relied upon by Petitioner are that the allowance of an unused excess profits credit carry

over from the fiscal year 1942 is mandatory under Section 710 (c) (3) (B) of the Internal Revenue Code of 1939."

ROBT. J. BANNISTER
E. B. CARPENTER
JAMES E. COONEY
Attorneys for Petitioner.

[fol. 91] (Notice of filing of Amendment to Petition for Review and Acknowledgment of Service).

(Filed January 5, 1956, The Tax Court of the United States).

To: John Potts Barnes,
Chief Counsel,
Internal Revenue, Service.

You are hereby notified that the above-named petitioner did, on the 5th day of January, 1956, file with the Clerk of The Tax Court of the United States, at Washington, D. C., an Amendment to Petition for Review by the United States Court of Appeals for the Eighth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the amendment to petition for review as filed is hereto attached and served upon you.

Dated this 5th day of January, 1956.

HOWARD P. LOCKE
Clerk,
The Tax Court of the United States.

Service of copy of Amendment to Petition for Review acknowledged this 5th day of January, 1956.

JOHN POTTS BARNES
WMF
Chief Counsel.
Internal Revenue Service, Attorney for Respondent.

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* * * * * * *

[fol. 94] (Clerk's Certificate to Transcript).

The Tax Court Of The United States
Washington

May Seed And Nursery Company, Petitioner,
Docket No. 50073 vs.
Commisioner Of Internal Revenue, Respondent.

I, Howard P. Locke, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 93, inclusive, contain and are a true copy of the transcript record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony Whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 17th day of January, 1956.

Seal
The Tax Court Of The United States

HOWARD P. LOCKE
Clerk,
The Tax Court of the United States.

[fol. 95] (Order of The Tax Court of the United States extending time to file Record on review).

For cause, it is

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Eighth Circuit is extended to February 28, 1956.

J. E. MURDOCK
Chief Judge.

Dated: Washington, D. C.
December 23, 1955.

A True Copy:
Attest:

HOWARD P. LOCKE,
Clerk,
The Tax Court of The United States.

gwc

Office - Supreme Court U.S.
FILED
AUG 13 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 360 .

MAY SEED AND NURSERY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

PAUL FRED AHLERS,
1012-1020 Bankers Trust Building,
Des Moines (9), Iowa,
Attorney for Petitioner

BANNISTER, CARPENTER, AHLERS & COONEY,
Of Counsel.

E. L. MENSENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. .....

MAY SEED AND NURSERY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause, on the 13th day of March, 1957. Petition for Rehearing was denied by the United States Court of Appeals for the Eighth Circuit by Order entered on the 15th day of April, 1957.

OPINION BELOW.

The Opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported in the bound volumes of the Federal Reporter, but is reported in Volume 242, Federal Reporter Advance Sheets, pages 151 to 155. The Order of the United States Court of Appeals denying Petition for Rehearing is not reported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Under the provisions of the excess profits tax law a constructive average base period net income for the fiscal years 1941 to 1946, inclusive, was agreed upon between the Commissioner and the May Seed and Nursery Company, the petitioner herein. Under this agreement, the petitioner's excess profits tax credit for the year 1941 was determined and there was an unused credit carry-over from 1941 of $18,487.12. The Respondent denied petitioner's right to use this credit in computing its tax for the fiscal year 1942 under a Treasury regulation which required the petitioner to have claimed its unused credit when petitioner filed its claim under Sec. 722* on September 15, 1943.

The first question presented is that the controlling sections of the statute, Section 710 (a), (b), (c) and (d)

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*All references to the Revenue Code are to the *1939 Code*.

and Section 722 (a), were clear and not subject to being modified or added to by the Treasury regulation. Stated in simple terms, Section 722 (a) provides that when a taxpayer has established a constructive average base period net income, the constructive average shall be used in lieu of its actual average base income. The petitioner established a constructive average base period net income under the law and regulations and concluded the proceeding under Section 722 with the signing of the agreement with the excess profits tax counsel on April 3, 1952. No further consideration of Sec. 722 (a) need be given to determine the issue here, because the statute neither permitted nor required anything more; all that remained was to compute the tax on the adjusted excess profts tax net income as defined in Sec. 710 (b), *Definition of adjusted excess profits tax net income,* which reads as follows:

> "As used in this section, the term adjusted excess profits tax net income means the excess profits tax net income minus the sum of, one, specific exemption, two, excess profits credit, and, three, unused excess profits credit less the amount of the unused excess profits credit adjustment for the taxable year computed in accordance with subsection (c)."

Sec. 710 (c) (3) (B), *Unused Excess Profits Credit Carryover,* provides:

> "If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit *shall be an unused excess profits credit carryover for each* of the two succeeding taxable years, except that the carryover in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the intervening taxable year. * * *" (emphasis supplied).

There is no controversy between the parties as to the amount of the excess profits net income or the amount of the three (3) deductions to be made therefrom to arrive at the adjusted excess profits net income. The controversy is confined to one point, namely, Respondent claims that the amendment to his regulations of July 21, 1944, required the Petitioner in his claims under Sec. 722 filed on September 15, 1943, to have specifically claimed a carry-over from 1941 to 1942. The Petitioner claims that the provisions of Sec. 710 are unambiguous and mandatory and, even assuming that they were not, a 1944 amendment cannot be given retroactive effect so as to apply to its claim filed on September 15, 1943.

REASONS FOR GRANTING THE WRIT.

1. The provisions of Sec. 710 above are unambiguous and mandatory.

2. A statute, plain on its face, may not be added to, interpreted, nor affected by departmental regulation.

3. A regulation, valid or invalid, issued under Section 722 cannot affect Section 710. The opinion, succinctly stated, holds that a regulation of the Commissioner of Internal Revenue issued under Section 722 can be retroactively applied to invalidate Section 710. Such a legal error must be corrected.

4. There is a conflict in the decisions of the Seventh and Eighth Circuits, and the matter should be settled by a decision of this Court.

Of these in their order, *the provisions of Sec. 710 are unambiguous and mandatory*:

In *Wiener Machinery Co., Inc.*, v. *Commissioner*, 16 T. C. 48, it is held that in that case there was no carry-

over from one year to the next because the carry-back to the previous year had absorbed the credit. The Court said on page 52:

> "The Petitioner concedes that the Respondent in his review of its excess profits tax return for 1945, has applied properly to the years 1941, 1942, 1943 and 1944 the statutory provision set forth in Section 710 (c), as Petitioner must do because the procedure set forth for the computation and carry-back and carry-over of the unused excess profits credit adjustments *are mandatory.*" (Emphasis supplied).

In the case of *Teichert & Sons, Inc., v. Commissioner,* 18 T. C. 785, this Court again considered the provisions of Sec. 710 (b) (3), providing for the deduction of unused excess profits credit in determination of adjusted excess profits income, and held that they are mandatory and do not give an election as to the application of an available carry-back of an unused credit. On this question, the Tax Court said, on page 787:

> "We find no ambiguity or obscurity in the provisions of Sec. 710 (b) (3) or related sections material to this proceeding, which would justify resorting to extrinsic sources, such as legislative history, to determine their meaning. It is a basic rule of statutory construction that where the language is plain and admits of no more than one meaning, there is no need for extrinsic, interpretive aids. The language being plain and not leading to absurd or wholly impractical consequences, it is the sole evidence of the ultimate legislative intent."

A recent case very much in point on this subject is *H. Fendrich* v. *Commissioner,* 192 F. 2d 916, and on second appeal *H. Fendrich* v. *Commissioner,* 242 F. 2d 803. This case holds that where a question of tax due is properly before the Tax Court on the question of a proper base

period net income, it is before that Court upon other issues, including the standard issues as well, for determination of the amount due. Reference is made in the second opinion to Sec. 322, as follows:

> "Sec. 322, *Refunds and Credits*—b. *Limitation on allowance* (1) *Period of Limitation.* Unless the claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer, or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever periods expires the later."

It was held by the Tax Court that this section barred consideration of amounts which were paid in previous years. The Court refers to the case of *American Standard Watch Co., Inc.*, v. *Commissioner*, 2nd Cir., 229 F. 2d 672, in which the taxpayer filed claim for relief under Sec. 722 and it was held that while the matter was pending before the Commissioner, who had it under advisement, the right to collect the claims expired. Petitions were then filed with the Tax Court. The Commissioner contended that the corporation which filed the claims no longer existed when it filed its petition with the Tax Court, therefore, the petition should be dismissed. The Tax Court agreed but the Court of Appeals reversed, saying:

> "The obvious purpose of the remedial or equitable provision of the Code would be frustrated by an interpretation which would thus separate the filing of refund claim from the filing of the Tax Court petition. We regard them both as but parts of the same proceeding which began when admittedly each of these corporations still lived."

In the case at bar the Petitioner claims that the Internal Revenue Code, Sec. 710, is plain on its face; that it provides

for credit for an unused excess profits carryover to the first and second succeeding years and that it is mandatory and may not be affected by a regulation, for the reason that a statute which is plain on its face may not be added to, interpreted nor in any other way limited by a departmental regulation.

In *Phillips Petroleum Company* v. *Commissioner*, 176 F. 2d 737, the Circuit Court of Appeals for the Tenth Circuit, held that it was bound by the decision of the case of *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, and added:

> "It is said that where the administrative agency is possessed of continuing rule-making power, as is the Commissioner of Internal Revenue, the Court should not hamstring it by prohibiting future changes *prospective* in nature." (Emphasis supplied).

In *Langstaff* v. *Lucas*, 9 F. 2d 691, affirmed by the Sixth Circuit Court of Appeals, 13 F. 2d 1022, it was held the language of the statute was plain and unambiguous and could not be modified nor affected by departmental rule. In that case the taxpayer had relied upon Article 1566 of Regulation 45, 1919 Edition, which held that distribution in kind by a corporation on dissolution to its stockholders was not taxable. The Court held that the clear provisions of the law taxing gains from liquidation made this distribution taxable and that the provisions of the law must prevail over the regulations. The Court said:

> "In dealing with regulations relied upon by the plaintiff, it must be borne in mind that the Treasury Department was not, and could not be authorized by the Revenue Act of 1918 * * * under which the tax here involved was collected, to impose income taxes nor to exempt from income taxation. That power is vested in Congress and was exercised by that body in the Act of 1918. The only power given to the Treas-

ury Department by that Act in respect to regulations, was to make all necessary regulations for carrying out the provisions of the Act. Therefore, it necessarily follows that any regulations of the Treasury Department which would exempt from taxation income which the statute specifically taxes, would be void."

In *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194, The United States Supreme Court held that Congress may not delegate its purely legislative powers, saying on page 214:

> "The Congress may not delegate its purely legislative power to a Commission but, having laid down the general rules of action under which the Commission shall proceed, it may require of that Commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

In *Field* v. *Clark*, 143 U. S. 649, l. c. 693, and 694, the Court said:

> "The true distinction, as Judge Renny, speaking for the Supreme Court of Ohio, (*C. W. & Z. R. R. Co.* v. *Com.*, 1 Ohio St. 77, 88) has well said, is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In the case of *In re Mellia*, (D. C.) 5 F. 2d 687, 689, the Court said:

> "Did the making of the departmental regulation here in question come within the power conferred by the last statutory provision? It is settled law that while any executive tribunal or official may constitutionally be empowered by Congress to make such regulations as are reasonably necessary to the proper execution of the statute, so long as such regulations are made administrative in character and relate only to the enforcement of the statute, that such an executive tribunal or executive cannot, constitutionally, either with or without the sanction of Congress, make any rule or regulation, the effect of which would be to add to, take from, or otherwise change the statute, for that would be to permit the executive department to encroach upon and usurp the function of the legislative department to which alone belongs the power to legislate."

The law as laid down in these decisions and applicable to the case at bar, is that under the plain provisions of Section 710 (c) (3) B, the petitioner was entitled to credit for the unused excess profits carry-over from 1941 to 1942, and the regulation promulgated in 1944, forbidding this to be done, is not valid.

A consideration of the facts and the law applicable thereto in this case, leads undoubtedly to the conclusion that there was no room for the operation of a departmental regulation eliminating the application of the unused excess profits tax credit from 1941 to 1942.

Furthermore, that the holding of the Court of Appeals for the Seventh Circuit that once the case is properly lodged in the Tax Court, on whatever ground, that Court has a right and duty to determine the amount

of the tax or refund arising from that or any other source, is sound and should be adhered to.

To correct the error above pointed out, we respectfully ask that this Court grant the Writ asked for so that justice may be done in this case.

Respectfully submitted,

PAUL FRED AHLERS,
Attorney for Petitioner.

BANNISTER, CARPENTER, AHLERS & COONEY,
Of Counsel.

PROOF OF SERVICE.

I, ..., a member of the Bar of the Supreme Court of the United States, and attorney for the Commissioner of Internal Revenue, Respondent, hereby accept service and acknowledge receipt of two copies of the foregoing Petition to the United States Supreme Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit this ..... day of ....., 1957.

.....
Attorney for Respondent.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,518.

May Seed and Nursery Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent.	Petition to Review Decision of The Tax Court of the United States.

[March 13, 1957.]

Robert J. Bannister (James E. Cooney, E. B. Carpenter and Bannister, Carpenter, Ahlers & Cooney with him on the brief), for Petitioner.

Harry Marselli, Attorney, Department of Justice (Charles K. Rice, Assistant Attorney General, and Lee A. Jackson, Attorney, Department of Justice, with him on the brief), for Respondent.

Before SANBORN, JOHNSEN and WHITTAKER, Circuit Judges.

JOHNSEN, Circuit Judge.

The Commissioner of Internal Revenue refused to allow May Seed & Nursery Company, of Shenandoah, Iowa, to have the benefit, under 26 U. S. C. A., Int. Rev. Code of 1939, § 710, for its fiscal year 1942, of an unused excess profits tax credit carry-over, from its fiscal year 1941,

based on a constructive average base period net income established in 1952 between the parties under § 722 of the Code. The result was a determination of deficiency against the taxpayer for the year 1942.

The ground of the Commissioner's refusal was that no claim for the benefit of such credit carry-over had been made in the application (or any amendment thereto) filed by the taxpayer for relief under § 722, to have a constructive average base period net income established and used in relation to its 1942 tax liability.

Treasury Regulations 109, Sec. 30.722-5, as amended July 21, 1944, contained certain procedural prescriptions, among which were the following: (a) * * * "If an unused excess profits credit for any taxable year for which an application for relief on the appropriate Form 991 has not been filed, computed on the basis of a constructive average base period net income, is to be used as an excess profits credit carry-over or carry-back, the taxpayer must file an application on Form 991 * * * for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied. The application in such case must be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied [which period under § 322 is in general 3 years from the date the taxpayer has filed his return or 2 years from the date he has paid the tax, whichever expires later]. In addition to all other information required, *such application shall * * * claim the benefit of the unused excess profits credit carry-over or carry-back.* If an application on the appropriate Form 991 for the benefits of section 722 has been filed with respect to a taxable year, or if the filing of such application is unnecessary under

(d) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such excess profits credit as an unused excess profits credit carry-over or carry-back *the taxpayer should file an application upon Form 991 * * * or an amendment to such application if already filed, for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied.* Such application or amendment should be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. * * * (e) The taxpayer shall file an application for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. * * *" (Emphasis supplied).

The Tax Court upheld the Commissioner's refusal and denied the petitioner relief, for the reason, as stated, that it had failed to claim the benefit of any possible credit carry-over, which might exist from its fiscal year 1941, in the application filed by it, or amendment made thereto, for relief under § 722 as to its fiscal year 1942. The Tax Court followed its previous similar holdings, in *Lockhart Creamery* v. *Commissioner*, 17 T. C. 1123, 1140-1143; *Barry-Wehmiller Machinery Co.* v. *Commissioner*, 20 T. C. 705; and *St. Louis Amusement Co.* v. *Commissioner*, 22 T. C. 522.

In the *Lockhart Creamery* case, the opinion had said: "Congress did not attempt in enacting section 722 to enumerate the requirements in connection with the taxpayer's application for relief, but the statute did authorize

the Commissioner with the approval of the Secretary of the Treasury to do so. In compliance with the Code provision, the requirements of an application for relief were set forth in [the Regulations referred to above in our own opinion]. * * * The computation of an unused excess profits credit * * * is by its own nature quite complicated and particularly is this so when the credit is to be increased by reason of section 722 relief. We are persuaded that for administrative reasons the formal and detailed requirements which here deny petitioner any excess profits credit carry-over based on section 722 relief for the years 1940 and 1941, were correctly prescribed by the Commissioner." 17 T. C. at p. 1142.

Stated more concretely in relation to the case that is before us, there would not seem to be any general unreasonableness in an administrative requirement by the Commissioner that, in the complexities involved in his dealing with an application for section 722 relief as to a particular year and a determining of the amount of taxes due for the year on the basis of any such granted relief, his notice should be specifically challenged to the fact that a carry-over or carry-back credit is to be taken into account by him, through the assertion of a claim for the benefit of such carry-over or carry-back credit in the application which the taxpayer has filed for an amendment made thereto.

Petitioner contends, however that the requirement of the Regulations for such a claiming of benefit of unused excess profits credit is in conflict with § 710 (c) (3) (B) of the Code, as amended, and that the requirement therefore is invalid. It argues that § 710 grants and makes mandatory an automatic allowing of use of any excess profits credit carry-over, without the need to make any

claim for the benefit. The provision relied on reads: "If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the intervening taxable year * * *."

The brief of petitioner quotes the statement of the Tax Court in *Wiener Machinery Co., Inc.*, v. *Commissioner*, 16 T. C. 48, 52, that "the procedures set forth [in § 710 (c)] for the computation and carry-back and carry-over of the unused excess profits credit adjustments are mandatory." But that case did not involve the matter of relief under any of the abnormality provisions of the Code, such as § 722, and the Tax Court has not accorded it any significance or relationship in its holdings in the *Lockhart Creamery*, *Barry-Wehmiller Machinery Co.*, and *St. Louis Amusement Co.* cases, *supra*, on the validity of the requirement of the Regulations for claiming the benefit of any unused excess profits credit as a carry-over or carry-back, to which the taxpayer may be entitled, in such applications as may be filed for relief under § 722 (a) to have a constructive average base period net income established.

Whatever automaticness of right there may exist under § 710 to have an unused excess profits credit taken into account is entitled to be treated, we think, as the Tax Court has done, as being at most related to adjustments arising under regular tax returns and not to determinations necessary to be made of the amount of taxes due as

a result of relief granted a taxpayer on its special application under § 722 (a) for the establishment of a constructive average base period net income as to its excess profits.

It is to be noted that the obtaining of relief under § 722 is a matter which a taxpayer ordinarily is entitled to have considered only after it has filed its return in regular course and has paid the taxes due on the basis thereof. Subsection (d) of § 722 expressly provides that "The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5)." And it is further provided that "The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section *makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.*" (Emphasis supplied).

Under the plenary power given the Commissioner to prescribe regulations as to the making of application by a taxpayer for special relief under § 722 (a), we can see no violation of the language or spirit of § 710 (c), in the requirement which the Commissioner has imposed, for administrative facilitation in the complex field involved, that any unused excess profits credit carry-over or carry-back, of which the taxpayer desires to have the benefit for purposes of its tax liability, must be claimed in the application filed for the special statutory relief, if the Commissioner is to be expected or compelled to take cognizance of it.

Petitioner makes the further contention that the provision of Sec. 30.722-5, of Regulations 109, requiring such a claim to be made in a taxpayer's application for relief under § 722 (a), was not promulgated until after the application under § 722 (a) that is here involved had been filed, and that it therefore could not properly be made applicable to it. But the regulation provided for a right to make amendment of any application which had been previously filed and by this means to claim the benefit of such a credit carry-over or carry-back. And even within the limitation under § 322 governing the right to file an application itself, there still remained, at the time the regulation was adopted, more than a year until the period of three years from the filing of petitioner's regular tax return would expire. Thus, it would not be possible abstractly to contend that the Regulations had, in their operation against petitioner's situation, not afforded it a fair opportunity for compliance.

Moreover, if the situation were one in which § 322 (b) (1) had been satisfied otherwise, the Commissioner could, for reasons which he might deem sufficient, have allowed the application under § 722 (a) to be amended, to make claim for the benefit of any unused excess profits credit for 1941, upon request on the part of the taxpayer to him, at any time up to the final disposition of the application, which occurred in 1952. Cf. *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293, 297, 65 S. Ct. 1162, 89 L. Ed. 1619; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. But petitioner made no such request, and after its application under § 722 (a) had been disposed of and the Commissioner had engaged in making determination of its tax liability on the basis thereof, it was not in a position to demand that waiver then be made of the requirement of the regulation. What the Tax

Court said in the *Barry-Wehmiller Machinery Co.* case, *supra*, 20 T. C. at p. 714, is applicable here: "This is not a case where respondent [can be held to have] waived the strict compliance with the regulations. He insists upon full compliance, which he may do."

It may be added that tax regulations are, of course, not invalid merely because they are made to have a retroactive application. Other elements or effects must be shown than this alone, before such regulations can be held to be legally unreasonable. Congress has left the Secretary of the Treasury and the Commissioner free to impose such a retroactive effect generally, by the provision of 26 U. S. C. A., Int. Rev. Code of 1939, § 3791 (b), that "The Secretary, or the Commissioner with approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." Retroactivity, therefore, is not a sufficient objection to a tax regulation, which otherwise is without invalidity in its application to a taxpayer's situation.

The Commissioner has made, but not pressed, a suggestion that it may be doubtful whether jurisdiction exists to engage in a review of the Tax Court's decision in the situation. 26 U. S. C. A., Int. Rev. Code of 1939, § 732 (c) provides that "If in the determination of the tax liability under this subchapter [Excess Profits Tax] the determination of any question is necessary solely by reason of * * * section 722 [or section 721 and parts of section 711 (b) (1), which are not here involved] the determination of such question shall not be reviewed or redetermined by any court or agency except (the Tax Court)."

But the questions raised by petitioner here go to (1) whether § 710 is controlling of the situation as against the

Treasury Regulations, and (2) whether the Regulations themselves are otherwise valid or applicable in the circumstances of petitioner's situation. We do not think it legally can be contended that these are determinations necessary solely by reason of § 722 of the Code.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

No. 360

In the Supreme Court of the United States

OCTOBER TERM, 1957

MAY SEED AND NURSERY COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
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CHARLES K. RICE,
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In the Supreme Court of the United States

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MAY SEED AND NURSERY COMPANY, PETITIONER

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Appendix B, *infra*, pp. 15–18) is reported at 24 T. C. 1131. The opinion of the Court of Appeals (Pet. A1–A9) is reported at 242 F. 2d 151.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1957. (R. A1.) A petition for rehearing was denied on April 15, 1957. (Pet. 1.) Upon application by the taxpayer, an order was entered by Mr. Chief Justice Warren on July 10, 1957, extending to August 15, 1957, the time within which a petition for a writ of certiorari might be filed. The petition was filed on August 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether, in the computation of its excess profits tax liability for 1942, the taxpayer was entitled to carry over to that year an unused excess profits credit from 1941 resulting from a "constructive average base period net income" established as relief under Section 722 of the Internal Revenue Code of 1939, where the carry-over had not been specifically requested in the application for relief under Section 722, as required by the regulations.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of Sections 710 and 722 of the Internal Revenue Code of 1939,[1] and of Section 30.722–5 of Treasury Regulations 109, are set forth in Appendix A, *infra*, pp. 9–14.

STATEMENT

The pertinent facts, as recited in the opinions of the Tax Court (Appendix B, *infra*, pp. 15–18) and the Court of Appeals (Pet. A1–A9), may be summarized as follows:

The taxpayer in 1943 filed its excess profits tax return for its fiscal year ended June 30, 1942. Thereafter, the period for assessment of deficiencies for that year was extended until June 30, 1947.

In 1943, the taxpayer filed applications for relief under Section 722 with respect to its fiscal years 1942 and 1943. In the application for 1942, it claimed a constructive average base period net income in an amount ($187,871.38) greater than its excess profits

[1] All Code references herein are to the 1939 Internal Revenue Code.

net income for that year, and hence it did not claim the benefit of an unused excess profits credit carry-over to that year based upon a constructive average base period net income from 1941. It did claim such carry-over in its application in respect to 1943.

After numerous intervening conferences and examinations of its books, the taxpayer in 1952 agreed to a constructive average base period net income in the amount of $96,900 for its fiscal years 1942 through 1946, and in the amount of $58,200[2] for 1941 "for carry-over purposes."

In his subsequent determination of the taxpayer's excess profits tax liability, and in his formal notice of the allowance in part, and disallowance in part, of the taxpayer's claim for Section 722 relief for 1942, the Commissioner refused to allow to the taxpayer an unused excess profits carry-over from 1941 to 1942 based upon a constructive average base period net income under Section 722.[3]

The Tax Court, in an opinion which was reviewed by its "Special Division",[4] upheld the Commissioner's action. (Appendix B, *infra*, pp. 15–18.) The Court of Appeals affirmed. (Pet. A1–A9.)

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[2] This figure was erroneously printed as $68,200 at R. 81.

[3] In a statement accompanying his notice, the Commissioner explained his refusal as follows (R. 9):

"The deduction of an unused excess profits credit carry-over, based on a constructive average base period net income determined by the Excess Profits Tax Council, from the taxable year ended June 30, 1941, to the year ended June 30, 1942, is not allowable for the reason that no claim for such credit carry-over was made on the application for relief filed for the year ended June 30, 1942."

[4] Pursuant to the provisions of Section 732 (d) of the Internal Revenue Code of 1939.

ARGUMENT

1. The courts below have correctly upheld the Commissioner's refusal to allow the taxpayer, in the determination of its excess profits tax liability for 1942, the carry-over to that year of an unused excess profits credit resulting from a constructive average base period net income under Section 722 of the Code (Appendix A, *infra,* pp. 11–12) for 1941, because such carry-over had not been specifically requested in any timely application for relief or timely amendment thereto, as required by the Regulations, Section 30.722–5 (a) of Treasury Regulations 109 (Appendix A, *infra,* pp. 12–13). In so doing, the courts below have correctly sustained the Regulations and their application to the facts of this case.

2. The decision below is consistent with all cases which have considered the problem as to the allowance of an unused excess profits credit carry-over (or carry-back) resulting from the grant of relief under Section 722, where such credit has not been expressly claimed in a timely application. *Lockhart Creamery* v. *Commissioner,* 17 T. C. 1123, 1140–1143; *Barry-Wehmiller Machinery Co.* v. *Commissioner,* 20 T. C. 705; *St. Louis Amusement Co.* v. *Commissioner,* 22 T. C. 522; and *Utility Appliance Corp.* v. *Commissioner,* 26 T. C. 366, pending on review in the Ninth Circuit. Cf. *Packer Publishing Co.* v. *Commissioner,* 17 T. C. 882, 898, reversed on other issues, 211 F. 2d 612 (C. A. 8th). See also, *Blum Folding Paper Box Co.* v. *Commissioner,* 4 T. C. 795, 796–797, 799.

Cases such as *Wiener Machinery Co.* v. *Commissioner,* 16 T. C. 48 (or *A. Teichert & Son* v. *Com-*

missioner, 18 T. C. 785), are not, as suggested (Pet. 4–6), at variance with the instant case, for, as the Court of Appeals properly pointed out (Pet. A5), Section 722 relief was not involved there.

3. The basic fallacy of the taxpayer's position—and of reasons 1, 2, and 3 urged (Pet. 4) for the granting of the writ—is its attempt to disregard entirely the fact that the carry-over credit it seeks in the instant case is one resulting from the grant of Section 722 relief. Thus, the taxpayer endeavors to view the matter as cast solely upon the *general* carry-over (and carry-back) provisions of Section 710 (c) (Appendix A, *infra,* pp. 10–11)—which provisions, it asserts (Pet. 4, 6–7), are clear, unambiguous and mandatory. But, as the Court of Appeals aptly stated (Pet. A5–A6), whatever "automaticness of right" there may be under Section 710 to take unused credits into account, that relates only to credits resulting under the normal provisions of the excess profits tax law and not to those arising as the result of a grant of relief under Section 722.

Undeniably, the unused credit sought to be utilized in this case is one arising only because of the grant of Section 722 relief. Therefore, the appropriateness and reasonableness of the Regulations must be viewed in the light of, not Section 710, but Section 722—and Section 722 (d) contains express congressional authority for the promulgation of regulations with respect to the filing of applications for relief under Section 722.

Contrary to the taxpayer's assertion (Pet. 9) that "there was no room for the operation of a depart-

mental regulation", the Court of Appeals was correct in holding (Pet. A4, A6) that, in view of the problems presented by Section 722, the Commissioner was fully warranted in adopting the challenged regulation "for administrative facilitation in the complex field involved" (Pet. A6). A mere reading of the relief provisions of Section 722 makes it readily understandable that Congress would choose to leave to the Commissioner the details for the administration of a matter as complicated as Section 722. See *Packer Pub. Co.* v. *Commissioner*, 211 F. 2d 612, 615 (C. A. 8th). Cf. *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293, 296.

4. The suggestion (Pet. 4) that there was any improper retroactive application of the regulation in this case was correctly rejected by the Court of Appeals (Pet. A7–A8). The charge of retroactivity stems from the fact that the taxpayer had filed its application for relief on September 15, 1943, while the pertinent amendment to the regulation was not adopted until 1944. (T. D. 5393, 1944 Cum. Bull. 415, amending Section 30.722–5 (a) of Treasury Regulations 109.) After the taxpayer had filed its application for relief, the controlling statute (Section 722 (d)) was finally amended by the Act of December 17, 1943, c. 346, 57 Stat. 601 (retroactively, so as to apply to all taxable years beginning after 1939), so as to require the filing of claims or applications for relief pursuant to regulations to be promulgated by the Commissioner, and extending the time for such claims to the same period as that prescribed by Section 322—in gen-

eral, three years after the filing of the return, or two years after the payment of the tax, whichever expires later. By the consents which had been executed, the statutory period as to 1942 had been extended to June 30, 1947, and thus the period for the filing of claims would not expire until six months thereafter (Section 322 (b) (3))—or until the end of 1947. Therefore, after the challenged regulation was amended in 1944, the taxpayer had over three and one-half years within which it could have made claim for the carry-over of the unused credit under Section 722, by an amendment to its application—and the Regulations expressly authorized the filing of amendments or supplemental applications for relief for such purposes (Section 30.722-5 (a) of Treasury Regulations 109).

5. Finally, there is no conflict, as urged (Pet. 4, 5–6, 9–10), with *H. Fendrich, Inc.* v. *Commissioner*, 242 F. 2d 803 (C. A. 7th). That case in no way involved the Section 722 regulation which is challenged here. Further, that case, unlike the instant case, involved a so-called "standard issue" (i. e., an issue as to other than relief under Section 722), and the Seventh Circuit merely held that, after a timely application for relief under Section 722 has been filed with the Commissioner, the ordinary statute of limitations does not operate to bar the refund of an overpayment resulting from a "standard issue"—a matter entirely unrelated to what was decided below in this case.

CONCLUSION

The decision below is unquestionably correct. The excess profits tax provisions here involved were re-

pealed in 1945. There is no conflict of decisions, and no question calling for review by this Court is presented. The petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1957.

APPENDIX A

Internal Revenue Code of 1939:

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

Subchapter E—Excess Profits Tax

[As added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940"].

SEC. 710. IMPOSITION OF TAX.

(a) [as amended by Section 201 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 202 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

* * * * *

(b) [as amended by Section 2 (a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by Section 204 (a) of the Revenue Act of 1942, *supra*] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) *Specific exemption.*—A specific exemption of $5,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) [as amended by Section 204 (b) of the Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—* * *

(B) *Unused Excess Profits Credit Carry-Over.*—If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the intervening taxable year computed for such intervening taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit or to any unused excess profits credit carry-back, and (ii) with-

out the deduction of the specific exemption provided in subsection (b) (1). * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

* * * * *

SEC. 722 [as amended by Section 222 of the Revenue Act of 1942, *supra*, and the Act of December 17, 1943, c. 346, 57 Stat. 601].

GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722 (b) (4) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b) (4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U. S. C. 1952 ed., Sec. 722.)

Treasury Regulations 109, promulgated under the Internal Revenue Code of 1939:

Sec. 30.722–5 [as added by T. D. 5045, 1941–1 Cum. Bull. 69, and as amended by T. D. 5264, 1943 Cum. Bull. 761, and T. D. 5393, 1944 Cum. Bull. 415[1]]. *Application for Relief Under Section 722.—(a) Requirements* * * *.

* * * * *

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[1] This section of the Regulations was further amended by T. D. 5483, 1945 Cum. Bull. 277, in respects not here material, effective January 5, 1946, according to T. D. 5530, 1946-2 Cum. Bull. 104.

Similar changes were made by T. D. 5393, *supra* (and T. D. 5483, *supra*) to Treasury Regulations 112, the excess profits tax regulations applicable to taxable years beginning after December 31, 1941

If an unused excess profits credit for any taxable year for which an application for relief on the appropriate Form 991 has not been filed, computed on the basis of a constructive average base period net income, is to be used as an unused excess profits credit carry-over or carry-back, the taxpayer must file an application on Form 991 (revised January, 1943) for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied. The application in such case must be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back. If an application on the appropriate Form 991 for the benefits of section 722 has been filed with respect to a taxable year, or if the filing of such application is unnecessary under (*d*) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such unused excess profits credit as an unused excess profits credit carry-over or carry-back the taxpayer should file an application upon Form 991 (revised January, 1943), or an amendment to such application if already filed, for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied.

* * * * *

(*d*) *Waiver of limitations for subsequent taxable years.*—The taxpayer shall file an ap-

plication for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. However, if a constructive average base period net income has been finally determined under section 722 (a) with respect to the taxpayer or if permission is granted by the Commissioner after a determination which has not become final, such taxpayer may use the constructive average base period net income so determined, except as further adjustments may be required by section 711 (b), in computing its excess profits credit based on income, its adjusted excess profits net income, and its excess profits tax in any return required to be filed thereafter. * * *

* * * * *

APPENDIX B

The Tax Court of the United States

MAY SEED AND NURSERY COMPANY, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 50073. Filed September 29, 1955.

In 1943 petitioner filed an application for relief under section 722 of the Internal Revenue Code of 1939 in respect of its fiscal year 1942, in which it did not claim a carry-over of an unused excess profits credit from its fiscal year 1941 based on a constructive average base period net income. *Held*, petitioner's right to the carry-over is conditioned upon the making of such claim. *Lockhart Creamery*, 17 T. C. 1123, followed.

Denver A. Busby, C. P. A., for the petitioner.
Julian L. Berman, Esq., for the respondent.

The respondent, in respect of the fiscal year of the petitioner ended June 30, 1942, determined a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69. In making the determination respondent refused to allow an unused excess profits credit carry-over based on a constructive average base period net income from the fiscal year 1941 in the amount of $18,487.12. As a result of such disallowance, the overassessment of excess profits taxes determined by the respondent was $7,181.79 less than the amount claimed by the petitioner, and petitioner's income tax liability was reduced in the amount of $2,226.35. The net amount in controversy is thus $4,955.44. The sole issue for determination is whether respondent erred in refusing to allow petitioner the benefit of the unused excess profits credit carry-over from its fiscal year

1941 to its fiscal year 1942, based on petitioner's constructive average base period net income.

FINDINGS OF FACT.

A stipulation of facts filed by the parties is hereby incorporated by this reference as a part of our findings.

Petitioner is a corporation organized January 1, 1919, under the laws of the State of Iowa. It has its principal office at Shenandoah, Iowa where it is engaged in the farm seed and supply business. Its return for the fiscal year ended June 30, 1942, was filed with the collector of internal revenue for the district of Iowa, at Des Moines, Iowa.

Petitioner filed a tentative excess profits tax return for its fiscal year 1942 on September 15, 1942, having previously been granted an extension of time to file its excess profits tax return for that year until October 15, 1942. The excess profits tax return for the fiscal year 1942 was then filed on October 15, 1942. By duly executed consents, the period within which the respondent could assess any deficiencies in income tax, excess profits tax, or war profits tax was extended until June 30, 1947.

On September 15, 1943, petitioner filed on Forms 991 applications for relief under section 722 of the Internal Revenue Code of 1939 in respect of its fiscal years 1942 and 1943. In the application in respect of its fiscal year 1942, petitioner claimed a constructive average base period net income of $187,871.38. This amount exceeded petitioner's excess profits tax net income for that year, and it did not claim the benefit of an unused excess profits credit carry-over for that year based on a constructive average base period net income from its fiscal year 1941. How-

ever, in its application in respect of the fiscal year 1943 it did claim such carry-over.

From September 15, 1943, to the end of 1951, numerous examinations were made of petitioner's books and records and a number of conferences held. During that period no constructive average base period net income was allowed, and no request was made that petitioner furnish a computation of any unused excess profits credit for its fiscal year 1941. On April 3, 1952, petitioner agreed to a constructive average base period net income as determined by the Excess Profits Tax Council. The constructive average base period net income so determined was approved by the Coordinator, Excess Profits Tax Council, on June 16, 1952, and was as follows:

Fiscal year ended June 30	*Amount of constructive average base period net income*
1941 (for carry-over purposes)	$58,200
1942	96,900
1943	96,900
1944	96,000
1945	96,900
1946	96,900

The respondent determined, for the fiscal year ending June 30, 1942, a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69, resulting from the partial allowance of the claim for relief under section 722 of the Internal Revenue Code of 1939. In determining the overassessment in excess profits tax for the fiscal year 1942 respondent did not allow to the petitioner the benefit of an unused excess profits credit carry-over from its fiscal year 1941 based on a constructive average base period net income. Respondent gave as his reason the fact that no claim therefor had been made as required by the regulations in the application filed by petitioner with respect to its fiscal year 1942. It is this refusal on the

part of the respondent which petitioner challenges and which raises the issues to be hereinafter met.

OPINION.

RAUM, *Judge:* Petitioner seeks the benefit of an unused excess profits credit carry-over based on a constructive average base period net income from its fiscal year 1941 to its fiscal year 1942, notwithstanding that it made no claim for such carry-over in its application for relief which it filed with respect to 1942. This issue is foreclosed by the decision of this Court in *Lockhart Creamery,* 17 T. C. 1123, 1140–1143. Cf. *St. Louis Amusement Co.,* 22 T. C. 522; *Barry-Wehmiller Machinery Co.,* 20 T. C. 705.

Reviewed by the Special Division.

Decision will be entered for the respondent.